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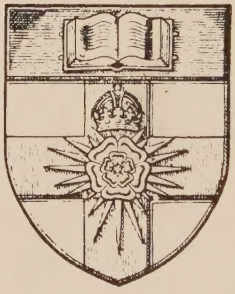

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The Right Hon. Gerald FitzGibbon.
The Right Hon. Samuel Walker.
The Right Hon. Hugh Holmes.

King's Bench Division.

The Right Hon. Lord O'Brien, L.C.J.
The Right Hon. Christopher Palles, C. B.
The Right Hon. William Drennan Andrews.
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The Hon. George Wright.

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The Right Hon. John Atkinson.

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James H. Campbell, K.C.

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CORRIGENDA.

Page 336, foot-note (1), *for* "1 I. R." *read* "2 I. R."

„ 494, line 14, *for* "*Inspector*," *read* "*Inspectors*."

„ 497, the names of the *Attorney-General* and *Solicitor-General*, who appeared for the Crown, were inadvertently omitted.

„ 522, line 5 from foot, for "*Reg.*" read "*Rex.*"

„ 522, line 4 from foot, for "*Houston* (1)" read "*Honiton* (7)."

„ 522, add foot-note—(7) Burrows' Settlement Cases, 680.

„ 524, lines 10 and 4 from foot, *for* "*Reg.*" *read* "*Rex.*"

CASES

DETERMINED BY

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL,

AND BY

THE COURT FOR CROWN CASES RESERVED.

1905.

HARVEY *v.* OCEAN ACCIDENT AND GUARANTEE CORPORATION (1).

K. B. Div. 1904. Jan. 22, 25, 27. May 14. *Appeal.* June 14, 15, 30.

Insurance—Condition in policy—Condition against suicide—Cause of death—Injury by accident from an outward, external, and visible means or cause—Drowning—Presumption against crime.

H. insured his life with the defendants by a policy, which became a claim if the insured sustained any bodily injury by accident from an outward, external, and visible means or cause, and died solely from the effects of such accident within ninety days; but the defendants were only bound to pay after proof, satisfactory to the directors of the Company for the time being, of the cause of death had been given. The policy contained a condition that it would not extend to death by suicide, and a condition that in the event of any dispute arising between the Company and any claimant it should be referred to arbitration, and that the decision of the arbitrator should be conclusive evidence of the amount payable in respect of the claim, and that obtaining an award should be a condition precedent to the liability of the Company to pay any claim under the policy.

(1) In the King's Bench Division, before LORD O'BRIEN, L.C.J., and MADDEN and WRIGHT, JJ.

K. B. Div. 1904.

HARVEY *v.* OCEAN, &c., CO.

The insured (H.) was last seen alive in Cork about 7 o'clock, p.m., on the 1st April, 1902. On the 20th April his body was found in the south branch of the River Lee, about one mile above Cork, without any marks of violence. At the coroner's inquest very little evidence was given, and a verdict was returned of "found drowned," and a newspaper cutting, containing the evidence and the finding at the coroner's inquest, was sent by the personal representative to the Company, claiming payment. The Company refused to pay, and the matter was referred to arbitration. Further evidence was given before the arbitrator tending to explain the finding of the body in the place where it was found, and to prove the probability of accident.

The arbitrator found that the death was caused solely by drowning; that the insured died solely from the effects of bodily injury from an outward, external, and visible means or cause, but that no evidence was given by either party on which the arbitrator could find or determine at what particular part of the river, in what manner, under what circumstances, or from what immediate cause, he became immersed in the river so as to be drowned, or on which he could find or determine, apart from any presumption of law, whether the cause of death was accident or suicide. He further awarded that proof of death by drowning was given, but no proof was given to the directors from which they ought to be reasonably satisfied that the death was accidental: if, on the true construction of the policy, the *onus* lay on the claimant of giving such proof, he awarded that he had not:—

Held, by Madden and Wright, JJ., (1) that proof by the administrator of H. that H. was found drowned in the River Lee, and that his death resulted solely from drowning, was not a sufficient compliance with the terms and conditions of the policy to entitle the administrator of H. to recover; (2) that the *onus* lay on the administrator of H. to give to the Company such proof of the drowning of H., and the proximate cause thereof, as ought reasonably to satisfy the Company that the drowning was the result of accident.

Held, by Lord O'Brien, L.C.J., (1) if there was nothing more in the case than the mere fact of the body being found drowned, that, having regard to the presumption against suicide and crime, death would be referable to an accident, and the administrator would, accordingly, be entitled to recover; but (2) that all the facts having been referred to the consideration of the Court by the arbitrator, the Company were, and would be, justified in not being satisfied that the death was due to an accident, and that, accordingly, judgment should be in favour of the defendants.

Held, by the Court of Appeal, upon the first question, that death by drowning is death from an outward, external, and visible means or cause, and that death from such a cause is *prima facie* death by accident; and when the tribunal of fact found the evidence so equally balanced that there was precisely the same weight of evidence in favour of accident as of suicide, the presumption of law against crime would entitle the claimant to recover the amount of the policy.

The Court of Appeal affirmed the decision of the King's Bench Division as to the second question.

CASE STATED by an arbitrator appointed under the conditions endorsed on a policy of insurance effected by C. M. Harvey with the Ocean Accident and Guarantee Corporation, dated 1st January, 1897, to award and determine:—"(*a*) Whether said C. M. Harvey died solely from the effects of bodily injury sustained by accident from an outward, external, and visible means or cause within the meaning of the policy; (*b*) whether proof satisfactory to the directors of the Corporation of the cause of the death of said C. M. Harvey was given within the meaning of the policy; (*c*) whether all the stipulations and conditions contained in or endorsed on the policy have been fulfilled so as to enable W. W. Harvey (the administrator of C. M. Harvey) to recover on foot of the same; (*d*) all other questions, matters, and things in controversy, arising out of or concerning said policy, or the reference, or in anywise incidental thereto."

The terms of the policy were that if the assured should sustain any injury by accident from an outward, external, and visible means or cause, and if the assured should die solely from the effects of such accident, within ninety days from the happening thereof, the Company should pay to his executors, administrators, or assigns £1000 after proof, satisfactory to the directors of the Company, of the cause of the death should have been given.

The policy contained a condition that the Insurance Company should not be liable in case of suicide; and also a condition that in the event of any dispute arising between the Company and any claimant, it should be referred to arbitration, and that the decision of the arbitrator should be conclusive evidence of the amount payable in respect of the claim, and that obtaining an award should be a condition precedent to the liability of the Company to pay.

When the claim was made on foot of the policy, the Company refused to pay, on the ground that satisfactory evidence had not been furnished to the Company that the death of the assured occurred from accident within the meaning of the policy. The matter was referred to arbitration, and the facts are fully set out in the arbitrator's award. Further evidence of the facts and surrounding circumstances was given before the arbitrator beyond what had been sent to the Company when the claim was made.

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The arbitrator found as follows (1) :—

1. The said C. M. Harvey at the time of his death was Secretary to the Royal Cork Yacht Club at Queenstown at a salary of £150 a year, with free apartments and board, and had other emoluments as Consul worth about £100. He was unmarried.

2. For many years prior to his death he was in embarrassed circumstances; and at the time of his death his debts amounted to about £600, exclusive of two large claims made against his estate since his death. One of these claims was preferred by the representative of a former steward of the Yacht Club for provisions, &c., supplied to said Charles Meade Harvey several years ago; and the other was a claim by Mr. Wade, a trustee with the deceased of the marriage settlement of Mrs. Collings, sister of said deceased, for contribution to a sum of £500 trust funds which Mr. Wade had been compelled to replace under an order of the Chancery Division of the High Court of Justice in Ireland made in the year 1895. The assets of the deceased were valued at £90, exclusive of the amount of the policy in dispute.

3. In and prior to the year 1902 the deceased had, as secretary to the Yacht Club, received moneys for bar accounts and subscriptions, which ought to have been lodged in bank to the credit of the Club, and had applied portions of said moneys to his own use. The deficit in his accounts in respect of these moneys amounted in December, 1901, to £39, and in April, 1902, to the sum of £59, after crediting him with the proportion of salary due to the latter date. Complaint was from time to time made by one of the club trustees of the irregular way in which the accounts were kept, and the moneys dealt with by the deceased. The deceased had an account of his own with the Bank of Ireland at Queenstown, guaranteed by a friend to the amount of £50. In the month of March, 1902, this account was overdrawn, and the Bank was pressing to have it squared. The deceased met this demand by lodging the acceptance of a friend for £40. He was about the same time threatened with an action for the price of a gold cigarette case which he had purchased on credit, after receiving the money to buy it from a friend who desired to make him a present.

(1) The arbitrator stated his award in the form of a Special Case for the opinion of the Court, under sect. 8 of the Common Law Procedure Act, 1856.—[REP.]

4. Immediately prior to the 1st April, 1902, the deceased was trying to borrow money. He had applied to a friend in Cork, Mr. A., who had accommodated him on previous occasions, stating that he wanted money urgently; but this gentleman declined to make a further advance. He also wrote to a friend in England, Mr. B., for a loan of £50, on the security of share certificates of the estimated value of £70, and Mr. B. sent a cheque for the amount, returning the certificates; but Mr. B.'s letter was not delivered at Queenstown till the 2nd April, 1902, and never reached the deceased.

5. The immediate relatives of the deceased in Cork were his brother, W. W. Harvey, and his sister, Mrs. Haynes. The former had not been in communication with the deceased for six months prior to his death, and the latter had not seen him for about two years. There was no evidence of his state of health, mental or physical, immediately before the 1st April, 1902. He was described as being generally of a cheerful disposition, not prone to be affected by pecuniary troubles.

6. On the evening of the 1st April, 1902, shortly after 7 o'clock, p.m., the deceased, with a person whose name was not given, entered the refreshment room at the Glanmire Station of the Great Southern and Western Railway, situate on the eastern side of Cork city, and had one drink.

7. He got an envelope from the attendant, put into it the gold cigarette case, already mentioned, without any other enclosure, addressed the envelope to the solicitor at Queenstown who was applying for the price, and asked the attendant to post the envelope at the station, which she did. Between 20 and 25 minutes after 7 he was seen alone in a covered hackney-car which was being driven through King-street, from the direction of the railway station towards the centre of the city. There was no evidence on either side of his being seen later in the city or elsewhere till the evening of Sunday, the 20th April, when his dead body was found in the south branch of the River Lee.

8. The part of the river in which the body was found is on the western side of the city, outside the borough boundary, and between bridges known as the Gaol Bridge on the eastern, and George IV.'s Bridge on the western, side. The body was in a

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nook, on the northern bank, nearly upright in 6 or 7 feet of water, the head resting against the bank, and partly over water, and facing up stream. The body was clothed in deceased's ordinary walking attire, without an overcoat. The coat was buttoned across the breast. The head and clothes were smeared with clay as if the body had lain for some time in contact with a muddy bed. There were some slight *post-mortem* abrasions on the forehead. The sole cause of death was drowning; the body was in an advanced stage of decomposition, and had been in the water for upwards of fourteen days. In the breast-pocket of the coat was found a pocket-book, containing a card bearing the name of the deceased, six penny and one halfpenny stamps, a blank cheque of the Bank of Ireland, and the blocks of three dividend warrants for small sums in respect of the shares above mentioned; a letter, the contents of which are not material. There was also found on the body a pair of gold eye-glasses, seven shillings and one penny, a knife, a pencil-case, and a gold watch, which had stopped at 10.30 o'clock.

9. The river for the whole space between the bridges above-mentioned is not tidal, and is separated from the nearest highway, known as the Western Road, in part by private residences, and a public-house with grounds running back to the river, and in part by fields bounded on the roadside by a wall about four feet high, and open to the river. There is no access for the public to the river at any point between the bridges.

10. An inquest was held on the deceased on the 21st April, and a verdict of "found drowned" was returned. A newspaper cutting of the evidence, and the finding of the coroner's jury, was forwarded by W. W. Harvey to the directors of the Corporation; and the particulars therein contained are the only particulars of the death of the deceased furnished to the Corporation.

11. Mrs. Haynes, the sister of the deceased, was on the 1st April, 1902, residing at Cloghroe House, about eight miles from the city. The 1st April was her birthday. Her house can be reached from the city by roads on both sides of the River Lee as far as Carrigrohane Bridge, about three miles from the point where the deceased was found. There is also a public path (above mentioned), along the south bank of the river, commencing a short distance above George IV.'s Bridge, and terminating a

short distance below Carrigrohane Bridge. For part of the way the path runs close to the edge of the bank, is rough and narrow, and the bank steep and undercut by the river, which at this section is of considerable depth. About a mile below this part of the river it is crossed from side to side by the Corporation weirs. On the 1st April the flow of water over the weir was of inconsiderable depth. On the 19th April a heavy flood set in, causing the river to rise greatly on the weir, and the river was still in flood on the 20th. If the deceased had been drowned at the place suggested, the body might, in the state of the river between the 1st April and the 20th April, have lain in the deep reaches above the weir until disturbed by the flood, and might then have drifted over the weir into the south branch of the river to the place where it was found.

12. It was proved that the said C. M. Harvey had, when in difficulties on a previous occasion, borrowed money from his sister, and had paid her visits at late hours in the evening, and on one occasion intimated that he had walked out by the bank of the river. But there was no evidence of his having expressed an intention to visit her on the 1st April, 1902, and there was no evidence on which, discarding mere conjecture, the arbitrator stated, he could find at what point of the river, or from what cause, the deceased became immersed in the river, so as to be drowned (1).

15. The arbitrator found and awarded that the death of said C. M. Harvey was caused solely by drowning in the River Lee, and that said C. M. Harvey died solely from the effects of bodily injury from an outward, external, and visible means or cause, but that no evidence was given by either of said parties on which he could find and determine at what particular part of the river, in what manner, under what circumstances, or from what immediate cause, the said C. M. Harvey became immersed in the river so as to be drowned, or on which he could find and determine, apart from any presumption of law that might exist, whether the cause of his death was accident or one of the causes excepted from the policy.

(1) Some further evidence, taken from the arbitrator's notes, was given as to the terms of friendship existing between the deceased and his sister, and which was admitted by consent of the parties, the effect of which is stated in the judgments in the Court of Appeal.—[REP.]

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He further found and awarded that proof was in due time, according to the conditions of the policy made by the said W. W. Harvey to the directors of the Corporation, that the death of the said C. M. Harvey was caused solely by drowning, but that no proof was given to the directors of the particulars of the drowning, that is to say of the circumstances under which the drowning took place, from which the directors ought reasonably to have been satisfied the death of C. M. Harvey was caused by accident, that is to say by an unlooked-for mishap or untoward event, which is neither expected nor designed. If, on the true construction and the conditions endorsed thereon, the *onus* lay on the personal representative of the said C. M. Harvey to give to the directors of the Corporation such particulars of the drowning as ought reasonably to satisfy the directors that the drowning was caused by accident, he found and awarded that such particulars were not given, and that said W. W. Harvey did not fulfil the condition of the policy so as to entitle him to recover on the same.

16. The questions of law for the Court were:—1. Whether proof by said W. W. Harvey that said C. M. Harvey was found drowned in the River Lee, and that his death resulted solely from drowning, was a sufficient compliance with the terms and the conditions of the policy to entitle said W. W. Harvey to recover the amount assured, unless it was proved by the Corporation that the drowning resulted from one of the causes excepted by the policy? 2. Whether the *onus* lay on the said W. W. Harvey to give to the directors of the Corporation such particulars of the drowning of said C. M. Harvey, and the proximate cause thereof, as ought reasonably to satisfy the directors that the drowning was the result of accident?

In concluding, the arbitrator stated:—

"If the Court shall answer the first question in the affirmative, and the second in the negative, I award that said W. W. Harvey is entitled to recover and do recover from the Corporation the sum of £1000. If the Court answer the first question in the negative, and the second question in the affirmative, I award that the said W. W. Harvey has not fulfilled all the conditions of the policy, and is not entitled to recover any sum on foot thereof."

Michael J. Dunn, with him *Hennessy, K.C.*, for the claimant:

The Corporation is liable on foot of this policy upon the assured sustaining any bodily injury by accident from an outward, external, and visible means or cause, and upon his dying solely from the effects of such accident, and independently of other causes. *Trew* v. *Railway Passengers' Assurance Co.* (1) decides that drowning is an outward, external, and visible means or cause. If the insurance money is payable only after proof satisfactory to the directors of the Corporation of the cause of the death of the assured, the directors in determining this question must act reasonably and not capriciously. Upon the evidence furnished to the directors, they could not have arrived at a conclusion other than that the assured met his death by accident from an outward, external, and visible means or cause, viz., drowning. They were not entitled to presume a felony. "No person shall, in the absence of criminative proof, be supposed to have committed any violation of the criminal law, whether *malum in se* or *malum prohibitum*, and this presumption holds in all civil and other proceedings for whatever purpose originated." See judgment of Bowen, L.J., in the *Hire Purchase Furnishing Co.* v. *Richens* (2). See also *Williams* v. *East India Company* (3). Incendiarism in fire policies stands upon the same footing as suicide in life policies, and when the insured is charged by the insurance company with having wilfully set fire to the premises, that crime must be as fully proved against him as if he were being tried on a criminal charge for the same offence: *Thurtell* v. *Beaumont* (4). The exemption from liability in the case of suicide is, on the terms of the policy, introduced by way of proviso, and cannot extend to a case in which there is no evidence of suicide. In other words, the directors cannot reasonably claim exemption from liability on the ground of suicide without evidence that the assured took his own life. The other exemptions introduced into the policy, by way of proviso, depend upon events that must be expressly proved, viz., intoxication, insanity, duelling, fighting, or other breach of the law on the part of the assured, or war, invasion, foreign enemy, popular riot, &c. If the policy makes "proof satisfactory to the directors" a condition precedent to

(1) 6 H. & N. 839.
(2) 20 Q. B. D. 387, at p. 389.
(3) 3 East, 192.
(4) 1 Bing. 339.

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recovery, such condition is unreasonable as constituting the directors judges in their own case.

The word "accident" in the policy has reference to the physical cause of death. If the word "accident" is to be interpreted as distinguished from suicide, it was unnecessary to introduce exemption in the case of suicide by way of subsequent proviso. Accidental death might happen from intoxication, insanity, duelling, fighting, and the like, all of which non-natural or accidental causes of death are exempted by way of proviso, and placed in the same category as suicide as being causes which would be within the scope of an accident policy, unless expressly excluded. Hence it is that simple proof that death arose from drowning is sufficient to establish a case of death by accident; and if exemption is claimed upon any of the grounds provided, such exemption can only prevail where there is evidence to support it. Here there is no such evidence.

D. B. Sullivan, K.C., and *T. Sullivan*, for the Guarantee Corporation:—

What the Court has to look to in the first instance is the risk that the Corporation has insured against. It has not insured against drowning *simpliciter*, but against accidental drowning. It is an accident policy, and it lies upon the persons claiming upon the death of the insured to show that that death resulted from accident.

Furthermore, upon the terms of the policy, the claimant can only recover "after proof, satisfactory to the directors of the Corporation for the time being, of the cause of the death of the assured." That is a condition precedent to recovering upon the policy. The only proof of the cause of the death of the assured furnished in this instance was the newspaper report of the inquest, and the correspondence, which pointed directly to suicide. The directors could not regard such proof of the cause of death as satisfactory, or as proof that the deceased met his death by an accident; and no Court could hold them to be acting unreasonably or capriciously in refusing to do so. There must be *proof*, and a presumption is not proof; it is a legal inference, and no more. Greenleaf on Evidence (ed. 1854), at p. 1, and Taylor on Evidence (ed. 1895), at p. 1, define "proof" as being synonymous

with evidence. Wharton's Law Lexicon, at p. 617, gives the following definitions of the word "proof":—"Evidence, testimony, convincing token, means of conviction." Best on Evidence, at p. 5, says: "The word 'proof' seems properly to mean anything which serves, either immediately or mediately, to convince the mind of the truth or falsehood of a fact or proposition." Best on Presumptions, at p. 5, and Stephen's Digest of the Law of Evidence (ed. 1899), at p. 2, give similar definitions. There has been no proof here within any of these definitions, and the claimant cannot discharge his obligation to give proof by relying upon a presumption—a legal inference. [The following cases were referred to:—*Gamble* v. *The Accident Insurance Company* (1); *Patton* v. *Employers' Liability Company* (2); *Manby* v. *The Gresham Life Assurance Co.* (3); *Stormont* v. *Waterloo Life Co.* (4); *Mardorf* v. *The Accident Insurance Co.* (5); *Smith* v. *The Accidental Insurance Co.* (6); *London Guarantee Co.* v. *Fearnley* (7).]

Hennessy, K.C., in reply, referred to *Winspear* v. *Accident Co.* (8); *Braunstein* v. *Accidental Death Co.* (9); *Hire Purchase Furnishing Co.* v. *Richens* (10).

Cur. adv. vult.

May 14.

LORD O'BRIEN, L.C.J.:—

This case has been reserved for our determination under the provisions of the Common Law Procedure Act, 1856, by Mr. George Lawrence, who was appointed arbitrator by the parties. The general question involved is whether under the terms of a certain policy of assurance effected on his life by the late Mr. Charles Meade Harvey for £1000, that sum, now that Mr. Harvey is dead, can be recovered by the plaintiff, his brother and administrator, from the Ocean Accident and Guarantee Corporation, with whom the policy was effected, and who are the defendants in this matter. The allegation of the defendants is that they are not bound to pay, inasmuch as it has not been shown to their satisfaction that the assured met his death from an accident.

(1) I. R. 4 C. L. 204.
(2) 20 L. R. Ir. 93.
(3) 4 L. T. (N. S.) 347.
(4) 1 F. & F. 22.
(5) [1903] 1 K. B. 584.
(6) 39 L. J. Ex. 211.
(7) 5 A. C. 911.
(8) 6 Q. B. D. 42.
(9) 1 B. & S. 782.
(10) 20 Q. B. D. 387.

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It is admitted that he met his death from drowning, but it is controverted that the drowning was accidental, and it is alleged by the defendants that it is a condition precedent to the right to recover the sum that the evidence relating to his death must be of such a character as to satisfy them, acting as fair and reasonable men, that the death from drowning was accidental. The plaintiff contends that the right to payment arose on the establishing of the mere fact of Mr. Harvey being found drowned. This is the substantial question in the case.

Is, then, the defendant's contention well founded? Does such a condition precedent to the right to recover exist? This altogether depends on the terms of the policy. One is reluctant to give an insurance company in their own case so wide a power, but the parties could make any contract they liked, and the question is, What contract did they make? It is admitted that the Company cannot act *malâ fide*, capriciously or unreasonably. What, then, are the terms of the policy? I shall read the words relied on:—"Policy of Assurance granted by the Ocean Accident and Guarantee Corporation, Limited (hereinafter called 'the Corporation'), to Charles Meade Harvey of the Cork Club, Cork, following the profession or occupation of merchant (hereinafter called 'the assured'): Whereas the said assured being desirous of making an Assurance, as hereinafter mentioned, has subscribed and delivered to the Corporation a proposal and declaration on the basis of the said Assurance, setting forth certain particulars and statements therein mentioned, and has paid to the Corporation the sum of three pounds twelve shillings, as a consideration for the said Assurance of the sum undermentioned for twelve calendar months, from twelve o'clock noon of the eighth day of January, 1897, it is witnessed that if the assured shall, during the period abovementioned, sustain any bodily injury by accident, from an outward, external, and visible means or cause, happening to the assured within the United Kingdom, or on the continent of Europe, or whilst proceeding from one European port to another in decked vessel, and if the assured shall die solely from the effects of such accident, and independently of other causes, within ninety days after the happening thereof, the Corporation shall pay to the legal representatives or assigns of the assured the sum of one

thousand pounds sterling, after proof, satisfactory to the Directors of the Corporation for the time being, of the cause of the death of the assured shall have been given." That is the relevant portion of the body of the policy.

Now, the contention, in the first instance, on behalf of the plaintiff is that, wholly irrespectively of the presumption of law against suicide, once proof is given of death from an outward, external, visible means or cause, which death from drowning is admitted to be, the obligation to pay arises. I cannot accept this primary contention. In my opinion, before an obligation to pay arises, it must be proved to the satisfaction of the directors, acting honestly and *bonâ fide*, that the death was accidental. This, I think, is now fully established by Mr. Sullivan in his clear argument. It appears to me clear that the risk insured against was accident. The policy is, so to speak, an *accident* policy. The Company is styled the Ocean Accident and Guarantee Corporation. The whole scope of the policy was to insure against accidents, and in express language the essential condition of the right to payment is the happening of an injury from accident, from an outward, external cause, and the establishment of that condition to the satisfaction of the directors. The legal question involved as to the condition precedent to the right to enforce payment rests upon the language of the policy. None of the cases cited have any real value, except perhaps *Trew* v. *The Railway Passengers' Assurance Co.* (1), which established that death from drowning is death from an outward, external cause; but that case leaves untouched the question whether, under the language of the particular policy we are dealing with, it must be death from accident. As I have more than once said, the legal question is to be determined by the language of the policy.

Mr. Lawrence, to whom the case was referred as an arbitrator under a clause in the policy, very clearly states his findings and the question he has reserved for our determination. He says also—"The several documents in the schedule hereto are to be taken as set out in this award; and at the request of the parties I annex hereunto my notes of the evidence of the witnesses examined before me; and the Court is to be at liberty to refer to same, and to draw such inferences of fact therefrom as I ought to have

(1) 6 H. & N. 839.

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done." It was admitted during the argument, in response to a question by me to counsel on both sides, that the whole case, the entire evidence and facts, were referred to us to draw our own conclusions. Of this I had, personally, great doubt, as my impression was that only mere questions of law could be referred under the particular section of the Procedure Act of 1856. However, the argument proceeded on the basis that we had all the functions as regards evidence and inferences of fact and law that Mr. Lawrence had. It will be seen that it was at the request of the parties he annexed the notes of the evidence.

If the case rested on mere drowning, and no other circumstance, having regard to the presumption against suicide, and against violence from third parties, and against crime, I would be very slow to hold that the condition precedent to show that it was accident should not be considered to have been satisfied. I put several questions to Mr. Sullivan during the argument. I suggested the case of a woman, whose husband was a slater, coming down Merrion-street with her husband's dinner. He had been working on the roof, and she found him dead from external causes, his neck broken from a fall. I asked Mr. Sullivan what proof would be required in a case of that kind. He said that she could not recover without giving direct, substantive, affirmative evidence that it was an accident. I would hesitate very long before adopting such a suggestion. In that case I think the presumption against violence or suicide would be sufficient to enable her to recover without giving evidence at all that it was an accident. I put another case to him of a man going out in a boat and being found drowned. He said that there should be some further circumstances to show that it was an accident. I cannot adopt that. Again, I put the case of a man who had gone out hunting, and was found dead in the hunting field, and he gave the same answer.

If it rested, in this case, upon the mere naked fact of the body of the late Mr. Harvey being found drowned, and if there was nothing more in the case—if, in the language of Mr. Lawrence, it appeared only that the late Mr. Harvey was found drowned in the river, and that his death resulted solely from drowning—even though the condition was a condition precedent to satisfy the directors by reasonable evidence that death was caused by accident,

I am of opinion that the presumption of law could be resorted to to show that it was a death from accident.

This was the secondary contention on the part of the plaintiff, and I think it was well founded. I am of opinion that in the latter case the proof—the proved state of facts which, in the eye of the law, raised a presumption against suicide—ought reasonably have satisfied the directors that the case was an accident, and that, accordingly, the *onus* of proof which lay upon the plaintiff was discharged.

However, the argument proceeded upon the distinct basis that we are entitled to look at all the evidence in the case; and looking at the evidence, I do not think it at all unreasonable on the part of the Company to be dissatisfied with the allegation that the death was one from accident. In my opinion, upon the whole case, I think our decision should be in favour of the defendants. If the case rested on the mere naked fact of the body of the late Mr. Harvey being found drowned—if the only thing established by the evidence was that the physical cause of death was drowning, this, in my opinion, irrespective of the presumption against suicide, would not be sufficient to entitle the plaintiff to recover; but I think regard should be had to the presumption against suicide or death by violence or crime, and that, accordingly, if there was nothing else in the case but the naked fact of death from drowning, the plaintiff, having regard to the presumption I have mentioned, would be entitled to recover; but on the whole case, considering all the facts of the case, I am not satisfied the drowning in question was due to accident, and I am, accordingly, of opinion that the directors would be, and were, justified in not being satisfied that it was due to accident, and that, accordingly, the decision should be in favour of the defendants.

MADDEN, J.:—

The first question to be considered in this case arises upon the construction of the policy of assurance of the 1st January, 1897. It is this, In what state of facts are the legal personal representatives of the assured entitled to demand payment of the sum of £1000 from the Corporation with which he was insured? The contract provides that they shall be entitled to payment if the

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assured shall, with certain limits of time and space as to which no question arises, "sustain any bodily injury by accident from an outward, external, and visible means or cause, and if the assured shall die solely from the effects of such accident, and independently of other causes: after proof, satisfactory to the directors of the Corporation for the time being, of the cause of death of the assured shall have been given."

What is the meaning of the words "cause of death of the assured"? and is the giving of proof of such cause of death, satisfactory to the directors, a condition precedent, which must be performed before any money becomes payable under the policy?

It is contended on behalf of the representatives of the assured (whom I shall call the claimants) that the obligation cast on them by the words which I have quoted has been discharged when they have furnished unquestioned proof that the assured met his death by drowning, inasmuch as by the words "cause of death" is intended only the physical cause of dissolution, and not the antecedent circumstances leading to the ultimate result, including the act, voluntary or involuntary, which placed the assured in the water. Death by drowning—that is to say, asphyxia, the result of suffocation—being a death from "an outward, external, and visible means or cause" within the meaning of an accident insurance policy (a proposition for which the case of *Trew* v. *Railway Passengers' Assurance Co.* (1) is an authority), they contend that their case is complete when satisfactory proof has been given of this physical fact; and that this is so, whether or not the clause in question is to be read as a condition precedent. Upon proof of this fact, they contend that it lies on the Company to establish by affirmative proof that the death of the assured was due to one of the causes to which it is expressly provided that the policy shall not extend, such as suicide.

What, then, is the meaning of the expression "cause of the death of the assured" in an accident policy? In answering this question we must have regard to the nature of the contract, to the words in which it is expressed, and the authorities which have been cited.

Now, in dealing with a claim under an accident policy, the

(1) 6 H. & N. 839.

question to be considered by the directors of the Company is not a physiological inquiry into the physical cause of death, but whether the risk against which they have insured the deceased has, in fact, occurred. This risk is not death by asphyxia, but death, whatever be the immediate physical cause, the result of accident. Turning to the document before me, I find, as I should expect, that the word "cause" is explained by the context to mean the circumstances by which the death of the assured has been brought about. The claim arises on the ground of "accident from an outward, external, and visible means or cause." It is stipulated that to give rise to a claim, the assured "must die solely from the effects of such accident, and independently of other causes." In the absence of coercive reasons to the contrary, I am bound to attribute the same meaning to the same word when it occurs in the concluding portion of the same sentence. So far from suggesting any reason to the contrary, the cases that have been cited establish the principle that, in ascertaining the cause of death, within the meaning of these words in an accident policy, the antecedent circumstances, and not merely the physical cause of death, are relevant to the inquiry. Thus, in the cases of *Winspear* v. *Accident Insurance Co.* (1) and *Laurence* v. *Accidental Insurance Co.* (2), the entire circumstances under which the assured met his end were considered, in order to ascertain whether the cause of death amounted to the risk covered by the policy. In *Mardorf* v. *Accident Insurance Co.* (3), the physical cause of death was septic pneumonia; but as the poison had been introduced by means of a wound accidentally inflicted, the wound was held to be the cause of death within the meaning of the policy.

I now proceed to consider the next question which arises on the construction of the policy: Is the provision requiring proof satisfactory to the directors (as to which I shall say something later on) of the "cause of death," a condition precedent to the accruer of liability under the policy?

It has long been the practice of companies insuring against fire and other accidents (as pointed out by Lord Blackburn in *London Guarantee Co.* v. *Fearnley* (4)), to make the fulfilment of

(1) 6 Q. B. D. 42.
(2) 7 Q. B. D. 216.
(3) [1903] 1 K. B. 584.
(4) 5 A. C. 911.

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stipulations contained in their policies, with reference to matters to be done by the assured, a condition precedent to the accruer of an obligation to pay, the reason being that if these stipulations were merely independent undertakings, and not conditions precedent, the remedy by action for not complying with them would not afford any protection to the Company. He refers to the case of *Worsley* v. *Wood* (1) as having finally established the efficacy of this mode of protecting themselves, when adopted by insurance companies. Whether it has been in fact adopted, is in each a question upon the construction of the individual policy.

The case of *Worsley* v. *Wood* (1) is of value as furnishing an answer to the inquiry whether a precedent could be found of a condition, analogous to that before us, being pleaded; and also as illustrating the strictness with which the Court holds parties bound to a contract of the kind. The plaintiff in that case, who claimed under a policy of fire insurance, set forth in his declaration a condition under which he was bound, after loss, to procure a certificate under the hands of the ministers and churchwardens of the parish, and of some reputable householders, as to the character and circumstances of the insured, and as to their belief that the loss had been sustained by the assured "by misfortune, and without any kind of fraud or evil practice." He sought to be relieved from the performance of this condition as pleaded, alleging that the minister and churchwardens had wrongfully, unjustly, and without reasonable or probable cause, refused to sign the certificate. The principle upon which the Court should proceed is thus stated by Lord Kenyon, C.J.:—"We are called upon in this action to give effect to a contract made between these parties; and if from the terms of it we discover that they intended that the procuring of the certificate by the assured should precede their right to recover, and that it has not been procured, we are bound to give judgment in favour of the defendant below." It is not necessary to constitute a condition precedent that a stipulation should go to the root of the contract, provided it appears that the parties intended that it should have that effect. "In the words used by the noble Lord (Blackburn) in his judgment in the Queen's Bench, in the case of

(1) 6 T. R. 710.

Bettini v. *Gye* (1), 'parties may think some matters, apparently of very trivial importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one.' That an insurance company can claim the protection of the rule thus expressed, is settled by the case of *Worsley* v. *Wood*" (2) (per Lord Watson, *London Guarantee Company* v. *Fearnley*) (3). Instances of the strict enforcement of the rule thus laid down are afforded by the cases of *Gamble* v. *Accident Assurance Company* (4), and *Patton* v. *Employers' Liability Company* (5).

Have, then, the parties sufficiently expressed an intention to make the fulfilment of the stipulation in question a condition precedent to the accruer of a claim under the policy? What is required to be furnished, is "proof satisfactory to the directors," that is, to say, proof by which they ought reasonably to be satisfied. In the policy before us the question whether the proof actually furnished satisfies this requirement is one of the questions which were to be determined by the arbitrator, who has expressed his opinion upon the point. In the absence of an arbitration clause, it would be determined by jury in an action on the policy. It could not be said of such a clause that it was (in the words of Lord Watson, *London Guarantee Company* v. *Fearnley* (3)) "to be so capricious and unreasonable that a Court of law ought not to enforce it, or to be *suâ naturâ* incapable of being made a condition precedent."

A provision, in all essential particulars similar to that which is now before us, came under consideration in the case of *Braunstein* v. *Accidental Assurance Company* (6). The deed of settlement of the Company provided for the furnishing of proof satisfactory to the directors. It was held that although the deed of settlement was referred to in the policy, this stipulation did not form part of the contract. But it is plain from the judgment of the members of the Court, especially from that of Blackburn, J., that a clause in the terms of the policy before us, if it formed a constituent part of the statement of the circumstances upon which payment was to

(1) 1 Q. B. D. 187.
(2) 6 T. R. 710.
(3) 5 A. C. 919.
(4) I. R. 4 C. L. 204.
(5) 20 L. R. Ir. 93.
(6) 31 L. J. Q. B. 718.

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be made, would be held to be a condition precedent to the accruer of a claim.

I am unable to discover any reason why effect should not be given to the plain language of the policy, which provides that payment is to be made upon the required proof being furnished. The express provision rendering compliance with the stipulations endorsed on the policy a condition precedent to the right to recover is relied on as raising an implication that a stipulation in the policy to which this provision does not apply is not intended to form a condition precedent. But this express provision is necessary in the case of the endorsed stipulations. They do not go to the root of the contract, nor is it expressly provided that payment shall be made upon compliance with their requirements. As separate and independent obligations they would be worthless to the Company. Care has, therefore, been taken to make them conditions precedent to the enforcement of a claim, which, under the terms of the policy is only to arise upon proof of the cause of death being furnished.

I now proceed to consider the question whether the proof of the cause of death which was furnished to the directors was a reasonable performance of this condition. The proof furnished consisted of a report of the proceedings at the inquest, and it is contended on behalf of the claimant that the proof of the physical cause of death thus furnished must be taken as satisfying the requirements of the policy, when aided by the legal presumption against criminality on the part of the assured, or of anyone else. But if I be right in holding that the cause of death includes the circumstances leading up to and constituting the effective cause of the fatality, these facts are to be proved, not presumed. The nature of the inquiry in such cases is thus described by Murphy, J., dealing with the facts before him in *Patton* v. *Employers' Liability Assurance Company* (1):—"There is a very extraordinary case to inquire into, viz., whether this man was accidentally drowned in sixteen inches of water"; and by Cockburn, C.J., in *Trew* v. *Railway Passengers' Assurance Company* (2), as including the act, voluntary or involuntary, which placed the assured in the water.

(1) 20 L. R. Ir. 93.

(2) 6 H. & N. 839.

The presumption of law against criminality would, in certain cases (as in those instanced by my Lord), be an important element in the claimant's case. But it would not arise until proof had been given of the state of facts which he has supposed, and it never could supply the place of proof as its foundation. In the state of facts before us the presumption carries us a very short way towards the ascertainment of the cause of death. On this branch of the case I adopt the words of the learned arbitrator when he finds that "no proof was given to the directors of the particulars of the drowning, that is to say, of the circumstances under which the drowning took place, from which the directors ought reasonably to have been satisfied that the death of the said Charles Meade Harvey was caused by accident, that is to say, by an unlooked-for mishap or untoward event, which is neither expected nor designed." Being of opinion that the furnishing of such proof was a condition precedent to the accruer of a claim, I hold that the claimant, Mr. William W. Harvey, is not entitled to recover any sum under the policy.

WRIGHT, J.:—

The question or questions in this case arise upon a policy of insurance, dated 1st January, 1897, made by the late Charles Meade Harvey with the Ocean Accident and Guarantee Corporation (Ltd.) against accident resulting in death or disablement.

Mr. Harvey was last seen alive on the 1st of April, 1902. On the 20th of April, 1902, his dead body was found in the River Lee, some distance above the city of Cork. On the next day, 21st of April, an inquest was held, and a verdict of "found drowned" was returned; a newspaper cutting of the evidence, and the finding of the coroner's jury, was forwarded by Mr. William Watson Harvey, his brother and administrator, to the directors of the Insurance Company, as "particulars," within the meaning of the policy, of the death from accident of the insured, and a claim was made for the amount payable under the policy, namely £1,000, which claim has been resisted by the directors on the ground that they were not satisfied that it had been proved that the death was caused by accident.

Of the correctness of the finding of the coroner's jury there

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can be no question—drowning was the actual physical cause of death beyond doubt or question. But the real question in the case is, Does proof of that, without more, entitle the claimant to receive the insurance money under the contract contained in the policy? This, at once, becomes a question of construction. What is the meaning of the contract?

The terms of the policy, so far as material, are as follows:—"If the assured shall, during the period above-mentioned, sustain any bodily injury by *accident*, from an *outward*, external, or visible means or cause, happening within the United Kingdom, etc. . . . , and if the assured shall die solely from the effects of such accident and independently of other causes, within ninety days after the happening thereof, the Corporation shall pay to the legal representatives or assigns of the assured the sum of £1000 sterling, after proof, satisfactory to the directors of the Corporation for the time being, of the *cause* of the death of the assured shall have been given."

The policy goes on to provide that the Corporation shall not be liable for death or injury of the assured from suicide or attempted suicide, whether felonious or not, nor in several other events; and it is expressly provided that compliance with the stipulations endorsed on the policy (fifteen in number) was a condition precedent to the right to recover on the policy.

The death of the unfortunate insured is shrouded in mystery. He was last seen alive on the evening of the 1st of April. The evidence given before the coroner's jury, and later before Mr. Lawrence, B.L., the arbitrator, would certainly show that he was in financial difficulties; in debt to the manager of the club of which he was secretary; in debt to friends who had assisted him with pecuniary help, and whose generosity was well-nigh exhausted; pressed by creditors generally, and threatened with legal proceedings; and no satisfactory explanation is suggested as to how he came to be on the banks of the River Lee late on the evening of the 1st of April, walking out in the direction of the country, and away from where he resided. I content myself with saying that the evidence which is before us, and which I have read, is, in my opinion, more consistent with the theory of suicide than with that of death by accident, *i.e.* by accidentally falling into the river.

The argument for the claimant is that there is a presumption against suicide, and that, therefore, it must be presumed that the deceased got into the river by accident, and so met his death; that the condition of the contract has been performed and satisfied, once the directors have been informed that the insured was found drowned; and that the "cause of death" within the meaning of the policy was the actual physical cause, namely, drowning.

It must be borne in mind that the policy of insurance here is not a life policy, where so much is insured and made payable on the death of the insured—what is insured against here is death by accident. If the contention of the claimant is correct, the directors must rest satisfied with a legal presumption, and infer from it death by accident, unless they can affirmatively prove, taking up the *onus* which the claimant says is cast upon them if they seek to escape liability, that the deceased committed suicide, and so bring themselves within the protection of the cases or contingencies excepted in the policy.

On the other hand, it is contended that what the Insurance Company contracted to get was not a legal presumption, but proof, and proof satisfactory to their directors, as a condition precedent to paying the amount insured.

I regard these words "proof, satisfactory to the directors of the Corporation, of the cause of the death of the assured," as a condition precedent to maintaining an action on the policy for the amount insured. The mere fact that these words are not called a condition precedent, while those endorsed on the policy are so called, will not prevent them having this effect, if that was plainly the intention of the parties to be gathered from the words used. In *Worsley* v. *Wood* (1), it was stipulated by the proposals of an Insurance Company that the persons insured "shall give notice of the loss forthwith, deliver in an account, and procure a certificate of the minister, churchwardens, and some reputable householders of the parish," etc. It was held that the procuring such a certificate was a condition precedent to the right to recover, and that it was immaterial that the minister, churchwardens, etc., wrongfully refused to sign the certificate. This case is referred to by Lord

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Blackburn in delivering judgment in the House of Lords in the Irish case of *Fearnley* v. *The London Guarantee Co.* (1), in the following terms:—"It has long been the practice of companies insuring against fire, for the purpose of their own security, to incorporate in their policies, by reference to their proposals, various stipulations for matters to be done by the assured making a claim before the Company is to pay them, and (as the remedy by action for not complying with these stipulations would not afford them any protection) to make the fulfilment of those conditions a condition precedent to their obligation to pay. There was much controversy on the subject about a century ago; but since the case of *Worsley* v. *Wood* (2), it has been settled law that this mode of protecting themselves is effectual."

The proof, and the only proof, furnished to the directors was a newspaper cutting of the evidence given at the inquest, and the finding given at the coroner's jury; and the directors write back to say that they cannot accept this as satisfactory proof of death by accident. In effect, they say that the evidence and facts laid before them so closely resemble a case of suicide that they cannot be satisfied that death was caused by accident.

What is the meaning in the contract contained in the policy of insurance of "proof of the cause of death" of which the directors are to have satisfactory proof before they pay the amount insured? Is it proof of the physical cause of death, or that death was caused by accident?

To turn again to the language of the contract—"If the insured shall sustain bodily injury from an outward, external, and visible means or *cause*, and if he shall die solely from the result of such accident, and independently of other *causes*, . . . after proof, satisfactory to the directors, of the *cause* of the death of the assured shall have been given." I am of opinion that these words "after proof, satisfactory to the directors, of the cause of death of the assured shall have been given," mean that the directors must be satisfied *by proof* that the death of the assured was caused by accident; and, further, that the proof should be such as should reasonably satisfy them, and that if they

(1) 5 A. C. 915, 916. (2) 6 T. R. 710.

unreasonably or capriciously rejected proof which ought to have satisfied them, their decision could not be upheld, *a fortiori*, if their rejection was corrupt or *malâ fide*. Here no such proof was given, and the directors rightly refused to accept as satisfactory the so-called proof that was offered, which, according to my construction of the contract, was no proof at all. It may be said that such a construction invests the directors of the Company with an immense power, as it enables them to decide claims made against them in their own favour. This consideration would furnish a strong objection to entering into such a contract, but cannot be a sufficient reason for declining to construe the contract according to its meaning; if that be plain, such a stipulation is not illegal, nor is it without precedent. To take the familiar illustration of the ordinary building contract, or contract for construction of large works. In such a contract the engineer of one of the contracting parties is invariably made the judge of all matters in dispute arising in the contract, and the obtaining of his certificate is made a condition precedent to the contractor getting paid. From his position, he (the engineer) cannot be either impartial or independent; he is the paid officer of one of the parties to the contract, and always more or less under their control, and yet he is invested with supreme power to adjudicate; and in the absence of fraud, his decision in all matters so referred to him is final and conclusive between the parties. (*Sharpe* v. *San Paulo Railway Co.* (1).)

For the foregoing reasons I have arrived at the conclusion that the meaning of the policy is what I have stated; that no proof was given which should or ought to have reasonably satisfied the directors that the death of the deceased was caused by accident; and that the questions submitted to the Court should be answered, the first in the negative, the second in the affirmative, with the result that the administrator, William Watson Harvey, is not entitled to recover the sum insured.

J. L.

(1) L. R. 8 Ch. App. 597.

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June 14, 15, 30.

W. W. Harvey appealed (1).

Matheson, K.C., Hennessy, [illegible], and *M. J. Dunn,* for the appellant.

D. B. Sullivan, K.C., and *Timothy Sullivan,* for the respondents.

FITZ GIBBON, L.J. :—

To understand the position in which we find ourselves in this case, it is necessary to direct attention to the origin and limits of our jurisdiction in the matter. The subject of the proceeding is the amount of a policy for £1000, dated January 1, 1897, which was kept up by Charles Meade Harvey until his death on April 1, 1902. That policy became a claim if the insured sustained any bodily injury by accident from an outward, external, or visible means or cause, and died solely from the effects of such accident, and independently of other causes, within ninety days after the happening thereof; but by the terms of the policy the obligation of the Corporation to pay the amount to the legal assigns of the insured only arose "after proof, satisfactory to the directors of the Corporation for the time being, of the cause of the death of the insured had been given." The policy contained a proviso that it should not extend to the death of the insured by—*inter alia*—suicide, whether felonious or not. There was a further proviso that compliance with certain endorsed stipulations was a condition precedent to the right to recover. These stipulations included some amplifications of the terms of the policy which I have read, which, in my opinion, do not materially alter what I have read. But one of them was that, upon any difference arising between the Corporation and any claimant as to any question, matter, or thing concerning the insurance, such difference should be referred to the arbitration and decision of a neutral person, each person to pay his or their own costs of the reference, and a moiety of the costs of the award, and that the decision of the arbitrator should be final and binding on all parties, and should be conclusive evidence of the amount payable in respect of the claim, and it was stipulated that the obtaining of an award by such arbitrator should be a con-

(1) In the Court of Appeal, before FITZ GIBBON, WALKER, and HOLMES, L.JJ.

dition precedent to the liability of the Corporation to pay any claim under the policy, in respect of which any such difference might have arisen, and to the enforcement of any such claim.

Lord Justice Holmes will read a judgment referring to the evidence in some detail. To avoid anticipation, I confine myself to stating the mode in which the case comes before us, the questions which have arisen, and our decision upon them.

The assured was last seen alive after 7 o'clock, p.m., on April 1, 1903. On Sunday, April 20, his dead body was found in the south branch of the River Lee, without any external injury, and the sole cause of death was drowning. The Corporation received a claim for payment of the policy, with a newspaper cutting of the evidence, and finding of the coroner's jury at the inquest held on the body, and the particulars therein contained were the only particulars of the death of the deceased furnished to the Corporation, and they are described in the case stated by the arbitrator to have been the only particulars furnished to the Corporation. The directors were not satisfied that this was proof of the cause of the death, and by Indenture of Submission, dated May 30, 1903, it was referred to Mr. George Lawrence, B.L., to determine:—

(*a*) Whether the assured died solely from the effects of bodily injury sustained by accident from an outward, external, or visible means or cause within the meaning of the policy?

(*b*) Whether proof satisfactory to the directors of the cause of the death was given within the meaning of the policy?

(*c*) Whether all the stipulations in the conditions endorsed had been fulfilled so as to enable the claimant, who is the personal representative of the assured, to recover on foot of same?

(*d*) All other matters and things in controversy arising out of or concerning the policy or the reference, or in anywise incidental thereto.

The award, so far as material, is in these terms—That the death was caused solely by drowning. That the assured died solely from the effects of bodily injury from an outward, external, and visible means or cause, but that no evidence was given by either party on which the arbitrator could find or determine at what particular part of the river, in what manner, under what circumstances, or from what immediate cause he became immersed in the river so as

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to be drowned, or on which he could find or determine, apart from any presumption of law that might exist, whether the cause of the death was accident or one of the causes excepted from the policy.

Suicide is, in this case, the only excepted cause of which there is any evidence or suggestion.

He further awarded that proof of the death by drowning was given, but that no proof was given to the directors of the circumstances under which the drowning took place, from which the directors ought reasonably to have been satisfied that the death was caused by accident. If, on the true construction of the policy, the *onus* lay on the claimant to give such particulars of the drowning as ought reasonably to satisfy the directors that the drowning was caused by accident, he awarded that such particulars were not given, and that the claimant did not fulfil the condition of the policy so as to entitle him to recover on the same.

On these findings the arbitrator, under the Common Law Procedure Act, 1856, section 8, stated his award in the form of a special case for the opinion of the High Court, and from that opinion given in the King's Bench Division the present appeal is brought.

The reference to the Court is contained in the following words:—[The Lord Justice read paragraph 16 of the case stated by the arbitrator, *ante*, p. 8.]

Beyond all doubt the answer to the second question must be in the affirmative, if we read it as a question of law applicable to the particulars supplied to the directors before the submission in this case; and though we have no jurisdiction to decide any question of fact, or to go beyond answering the questions which the arbitrator has submitted as part of his award to the High Court, I think he was right in holding that the newspaper cutting and the coroner's finding were not particulars sufficient to satisfy the directors, as reasonable men, that the drowning was caused by accident. But after the submission further evidence was produced for the first time, and further particulars were discovered, tending to explain the finding of the body where it was found, also tending to show the probability of accident, and to lessen the suspicion of

suicide ; and the first question is asked upon this altered state of facts. It is to be regretted that the arbitrator could not make up his mind upon the question of fact. It is suggested that he exceeded the reference in entering upon it at all, and the second question certainly seems to be immaterial if the arbitrator had authority to decide whether the policy should be paid or not. But the arbitrator has made it part of his award that he could not find, apart from any presumption of law, whether the cause of death was accident or suicide ; and the first question is unintelligible to me, unless it means that we are to say whether there is any presumption of law which ought to turn the scale, as between accident and suicide, where there is evidence both ways.

I cannot say that, as the case stood before the arbitrator, the issue of accident or suicide was one which should have been withdrawn from a jury ; or that a verdict either way could have been set aside as against the weight of evidence ; or that, if the directors had declined to be satisfied with the evidence of the case presented to the arbitrator, they could have been compelled to pay. So far as the first question is at all intelligible to me as a question of law, I can only understand it as asking this—If a man is found drowned, and certainly drowned either by accident or by suicide, and there is no preponderance of evidence as to which of the two caused his death, is there any presumption against suicide which will justify a jury or an arbitrator in finding that the death was accidental and innocent, and not suicidal and criminal? In my opinion there clearly is such a presumption. I have no jurisdiction to decide the question whether there is a preponderance of evidence one way or the other in this case. If I had such jurisdiction, I should have little hesitation in finding that the assured fell by accident into the Lee, from the dangerous path which he was following by night on his way to the house of his sister, to whom he was going on her birthday, in the hope of inducing her to relieve his pecuniary embarrassments by cashing the cheque which was found in his pocket. *Trew's Case* (1) is a decision that death by drowning is death from an outward, external, or visible means or cause, and that death from such a

(1) 6 H. & N. 839.

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cause is *prima facie* death by accident. Where it is proved that such a cause has produced death, and that the cause came into operation either from accident which is innocent, or from suicide which is criminal; if the tribunal of fact finds the evidence so equally balanced that there is precisely the same weight of evidence of accident as of design, if I was a judge charging a jury which had the exclusive jurisdiction to decide the fact, I would direct them, as matter of law, that the presumption against crime justified them in turning the scale to the side of accident. If the first question does not mean to ask whether such a direction would be right, I do not know what it means. Accordingly, I answer it in the affirmative.

But the case stated has provided only for the alternative results of the two questions being answered in each of the two opposite ways, and we can now only send the matter back to the arbitrator with our answers to both in the affirmative, and leave him to deal with the reference as he may be advised. Unless and until he can find a verdict one way or the other, I do not see that his award can be effective, but we cannot usurp his functions in the hope of making it so.

We are unable to find any jurisdiction in the King's Bench or here to order the costs of these proceedings to be paid otherwise than in accordance with the conditions endorsed upon the policy, and, therefore, the order of the King's Bench as to costs must be discharged.

I fear that the proceedings before the arbitrator have so far only reached a stage similar to that where a jury announces that it cannot find a verdict either way, but asks the Judge a couple of questions of law, the answer to either, or both, of which would still leave the case undecided, and which are scarcely reconcilable with each other. I cannot say whether the arbitrator can or will now decide, or whether either or both of the parties will be bound by his decision if he goes on. This Court can only answer his questions as we are now doing.

FITZ GIBBON, L.J., stated that Lord Justice Walker, who was unavoidably absent, concurred in the conclusion arrived at by the other members of the Court.

HOLMES, L.J.:—

Charles Harvey, who was the steward of the Queenstown Yacht Club, and the holder of a policy of assurance against accidental death from the Ocean Accident and Guarantee Corporation, Limited, was last seen alive on the 1st April, 1902, driving in a covered car in the city of Cork. On the 20th April his body, in an advanced state of decomposition, was found in the southern branch of the River Lee, beyond the western boundary of the borough. There was an inquest resulting in the verdict of "found drowned," and a copy of the newspaper report of the proceedings thereat was sent by William Harvey, brother and administrator of the deceased, to the directors of the Corporation, and afterwards there was some correspondence between their solicitors, in which, without an actual refusal on the part of the Corporation to pay the assurance money, there was no admission of liability. Finally, on the suggestion of the solicitor for Mr. Harvey, an arbitrator was agreed to, and the terms of reference were embodied in a deed, dated 30th May, 1903. By it Mr. Lawrence, the arbitrator, was to award and determine—(*a*) whether the deceased died solely from the effects of bodily injury, sustained by accident, from an outward, external, and visible means or cause within the meaning of the policy; and (*b*) whether proof satisfactory to the directors of the Corporation of the cause of the death of the deceased was given by the administrator within the meaning of the policy. The second of these questions is founded on a provision in the policy which requires as a condition precedent to payment that proof satisfactory to the directors should be given of the cause of death. I am at a loss to understand what object the parties had in view when they included in the same reference these two questions.

We are all agreed that what was required by the condition precedent was satisfactory proof of death by accident, but it was quite conceivable that the arbitrator might answer question (*a*) in the affirmative, and question (*b*) in the negative. What was the result intended in that event? No period is limited within which the proof is to be supplied. It is admitted that it would be in time if given before the claim is barred by the Statute of Limitations; and the intention may have been that if Mr. Lawrence had found on the evidence before him that the death was accidental,

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this would have been accepted by the directors as satisfactory proof, even if no such proof had been previously given. The arbitrator is, perhaps, inferentially authorised to declare the legal consequences of his findings; but it is not part of our duty to say what would be the effect of answering the first question in the affirmative, and the second in the negative; and I am not to be understood as offering any opinion on this point.

The arbitration was proceeded with in due course, with the result that Mr. Lawrence has stated the special case now under consideration pursuant to the Common Law Procedure Act, 1856, s. 8. He submits in this document two questions described as questions of law, but at the request of the parties he annexed his notes of the evidence of the witnesses examined before him, adding that the Court was to be at liberty to refer to the same, and draw such inferences of fact thereon as he ought to have done. This was not only a legal course to take, but in the circumstances proper and even necessary.

The first of Mr. Lawrence's questions is neither relevant nor intelligible, unless it is considered in connexion with the evidence, and the special case is silent as to one or two material inferences of fact. It was proved beyond reasonable doubt that the deceased came from Queenstown, where he lived in the Yacht Club, to Cork between six and seven o'clock on the evening of the 1st April, that after a short delay at the railway station he drove through some streets of the city, and that about, or soon after, 8 o'clock he lost his life by drowning in the River Lee, at some point beyond the western borough boundary. The place in which he was first immersed in the water is a matter of speculation, but it is pretty certain that it was higher up the river than where the body was found on the 20th April, and that the corpse was carried down the stream for some distance by a flood on the 19th. That the death was the result of accident, or suicide, is beyond doubt. The case was conducted on this assumption; the evidence demonstrates it; and I assume that this was the view of the arbitrator. There was neither proof, nor attempted proof, that Mr. Harvey had been suffering from illness, sleeplessness, despondency, or depression. The witnesses who had seen him shortly before his death had noticed nothing peculiar in his

words or manner. The ground on which it is suggested that he may have taken his own life is anxiety arising from pecuniary difficulties. He had an annual income of £150, with free apartments and board as club steward, and another £100, arising from consular fees; but he had no property of any kind beyond a few shares in a shipping company, of the value of about £70. At the time of his death he owed about £1200, consisting for the most part of debts of long standing. There is no one on whom money troubles sit more lightly than on a bachelor, with an income which his creditors cannot touch. This seems to have been the deceased's position; and I am not surprised that nothing was found in his papers or elsewhere indicating pecuniary pressure, except for a sum of £16, the price of a cigarette case. There is, however, no doubt that he was in urgent need of about £50 at the time of his death. He was in the habit of receiving club subscriptions and bar money, which it was his duty to account for to the committee, and on the day of his death he owed the club £59. The accounts, with the bank book, were laid before the committee monthly, and it was proved that in the week before Mr. Harvey's disappearance he wrote up his books, with a view, presumably, to the April inspection of them, and that he seemed pleased with the result. He must, however, have known that, although he was allowed to retain some money against petty disbursements, the amount due by him was too great to pass the committee, and that some money would be required to keep him out of trouble. Still there was nothing to cause despair, or even perturbation. He had some good friends. On the Saturday before his death Mr. Daly gave him "with pleasure" an acceptance for £40, to square his bank account. About the same time, he told Mr. O'Grady that he wanted some money urgently, and he would have got it if Mrs. O'Grady had not interfered. Indeed, notwithstanding the lady's intervention, Mr. O'Grady would probably have yielded if he had been told the purpose for which the loan was needed, for he was Mr. Harvey's security to the Yacht Club; but the deceased does not seem to have pressed the matter. He probably expected to get the money from another quarter, for he wrote to Mr. Brennan requesting the loan of £50, and sending as security the certificate for the shares already

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mentioned. I infer that this letter was written on either the 30th or 31st March, as the reply was delivered in Queenstown on the 2nd April, enclosing a cheque for £50, and returning the certificate. The foregoing is the evidence relating to Mr. Harvey's pecuniary circumstances, and I find therein nothing from which I can infer such anxiety of mind as would be likely to lead to suicide, while in the transaction with Mr. Daly on Saturday, and in the letter to Mr. Brennan on Sunday or Monday, there is evidence that he was not on those days contemplating self-destruction.

The incident of the cigarette case, when taken in connexion with Mr. Allen's evidence, is immaterial, and need not be referred to; but there is another matter of great importance with which I must deal.

At the inquest no explanation was given of the body being found in the upper waters of the Lee. This circumstance indeed is as difficult to account for on the theory of suicide as of accident. I know no place affording better facilities for drowning than from Queenstown seaward; and why a man residing there should go to the city of Cork, and some distance beyond it, to look for water, is a mystery. The evidence at the arbitration gives a natural explanation of his being in the neighbourhood of the place where his body was found on the evening of his death. I have no reason to doubt the truthfulness or substantial accuracy of what was deposed to by Mrs. Haynes. She was the sister of the deceased, and they were on friendly terms. She had made him a present of £300 in 1884; she had lent him £100 in 1897, still unpaid; and at different times £10, £15, and £35, for which he gave post-dated cheques, afterwards duly honoured. She lived in Cloughroe House, seven miles and a half from Cork, where he visited her from time to time, and where she gave him all save one of the sums mentioned. He always arrived after 8 p.m., and once he came so late that Mrs. Haynes was in bed, and had to be roused by pebbles thrown against the window. I gather that he generally walked to her house, as he seems either to have stayed there for the night, or been driven back again in his sister's trap. There are two high roads from Cork to Cloughroe; but there is also, for part of the way, a public path through the fields along the south bank of the river—a portion of which is described as absolutely

dangerous to anyone walking along it in the dark. On at least one occasion, and probably on more, he used this path in coming to Cloughroe House. The 1st April was Mrs. Haynes' birthday, on which he was in the habit of writing to her, or paying her a visit; but no letter was received from him on the day of his death. Now, it is incredible to me that the deceased, who was in need of £50, who was refused money by Mr. O'Grady, and who did not know whether Mr. Brennan would give it, would not endeavour to obtain it from the sister who had assisted him on previous occasions. I, therefore, draw the inferences of fact that he came to Cork on the 1st April with the intention of seeing her; that he selected her birthday as favourable for his purpose; and that when he reached the Lee, west of the city, he was on his way to her house. I am assisted in coming to this conclusion by the circumstance that he had in his pocket a blank cheque which could be post-dated like the previous ones given to her. If I am right in this, it is, I think, much more probable that he accidentally fell into the river when walking in the dark on the dangerous part of the path, than that he threw himself in before he had completed his purpose.

The foregoing observations clear the way for the consideration of the questions submitted in the special case. The second gives no trouble. The *onus* lay on the claimant to give to the directors such particulars of the drowning, and the proximate cause thereof, as ought reasonably to satisfy them that the drowning was the result of accident; and as Mr. Lawrence found as a fact that such satisfactory proof was not given before the arbitration, we are not at liberty to question this finding, even if we desired to do so. Moreover, we all concur in thinking that he was perfectly right in this conclusion.

The difficulty of the case is caused by the first question—Whether proof that Harvey was found drowned in the River Lee, and that his death resulted solely from drowning, was a sufficient compliance with the terms and conditions of the policy to entitle the claimant to recover the amount assured, unless it was proved by the Corporation that death resulted from one of the causes excepted by the policy? If this is to be read without reference to the facts proved, or any findings of fact thereon, it is a purely abstract question not arising in this case, and which I do not think could arise in any

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case. On the assumption I have made, the question becomes absurd. In all instances in which the circumstances that led to the death of a man found drowned become the subject of legal inquiry, something is known of the man himself, of when he was last seen, of the state of his mental and bodily health at that time, of the place where the body was found, and of other material matters. If the first question is intended to exclude all these things from the consideration of the Court, it ought not to be answered at all. We have declined to answer questions in cases stated by the Land Commission for which there was far more excuse. I am, however, sure that this was not the intention of Mr. Lawrence—an experienced and careful lawyer. It is quite true that he has not decided any question of fact in connexion with the first question, but he gives the reason for this. There was, he says, no evidence on which, discarding mere conjecture, he could find at what point of the river, or from what cause, the deceased became immersed in the water, so as to be drowned. This accounts for his annexing to the case notes of the evidence, and for the provision that the Court is at liberty to draw such inferences of fact as the arbitrator ought to have done. Such a reservation is unusual, and would have been unmeaning if Mr. Lawrence had himself found the facts; but being unable to do so, the case would have been incomplete without it. I have already stated the inferences I have drawn from the evidence; and if the first question is to be dealt with on the assumption that those inferences are incorporated in the case, it would follow that an affirmative answer ought to be given thereto.

But there is another, and perhaps a more satisfactory, ground for coming to the same conclusion. Let me refrain from drawing any inference of my own, and take up the neutral position assumed by the arbitrator. I presume that he had no doubt that the cause of death was either suicide or accident; but that he was unable to choose between them. A man in good health goes on the sea alone in a boat, and he is neither seen nor heard of until his body is washed ashore a week or two later. There is an absence of other evidence, and a legal tribunal, investigating a claim under a policy of assurance similar to Mr. Harvey's, is in a state of absolute doubt as to the cause of death. In such a case is there any pre-

sumption of law in favour of accident as against any other cause of death? I think there is. The death can only be reasonably accounted for in one of two ways—immersion in the water by accident or design; and an innocent cause ought to be presumed as against what would be *prima facie* a crime. There is ample authority that the presumption against crime is applicable in a civil action. I have found no English case turning on suicide; but my brother, Lord Justice Walker, has called my attention to an American case, *Walcott* v. *American Life, &c.*, mentioned in the *addendum* to the last edition of Taylor on Evidence, page cexxxviii., where it is stated that it has been held in a civil action (*e.g.* in an action on a policy of assurance), where there is no evidence as to its cause, that a death must be presumed to have been natural, and not to have been suicide, since suicide is a felony. This was the view of the Lord Chief Justice, and he would, I think, have answered the first question in the affirmative, if he had not drawn an inference of fact different from mine.

Cockburn, C.J., said, in *Trew* v. *Railway Passengers' Assurance Company* (1):—"We ought not to give to these policies a construction which will defeat the protection of the assured in a large class of cases." To require affirmative evidence of accident in cases like the present would undoubtedly have this effect.

For the reasons I have stated, I answer the first question in the affirmative, and the second in the affirmative; but, as I have already said, I give no opinion as to the effect of these answers.

Solicitor for the plaintiff: *Donegan.*
Solicitor for the defendants: *M. Healy.*

R. D. M.

(1) 6 H. & N. 839.

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Nov. 2.

Appeal. Dec. 4, 7.

THE COUNTY COUNCIL OF KERRY *v.* THE LIVERPOOL SALVAGE ASSOCIATION AND THOS. ENSOR & SON (1).

(1903. No. 1657.)

Practice—Discovery of documents—Privilege—Documents privileged in previous action between third parties—Order XXXI., Rules 12–14.

In an action by the plaintiffs against the defendants, claiming damages arising from the acts of the defendants in causing, during the course of salvage operations, a wrecked vessel to become an obstruction, the defendants, under an order for discovery of documents, stated, on affidavit, that they had in their possession certain documents, consisting of confidential correspondence, reports, &c., obtained or made by them as agents for an Insurance Company, in reference to matters arising in litigation "then anticipated and afterwards instituted" by the owner of the vessel against the said Insurance Company for the purpose of enabling the latter to be advised upon, and to defend, the claim made against them :—

Held, that the defendants were not entitled to exemption from discovery, as the documents would not have been privileged in the earlier action by the shipowner.

MOTION ON NOTICE.

The action was brought by the plaintiffs against the defendants to recover damages by reason of the defendants in the month of August, 1900, having stranded a wrecked vessel, the "Harriet Amelia," near the pier and breakwater of Knightstown, in Valentia Harbour, and thereby caused an obstruction.

In the month of October, 1900, an action was instituted by the owner of the "Harriet Amelia" against the Maritime Insurance Company, as insurers of the vessel, upon a policy of insurance. The defendants in the latter action paid into Court a sum of £160, which was accepted by the plaintiff in full satisfaction of his claim in the action.

The plaintiffs in the present action applied for and obtained

(1) In the King's Bench Division, before KENNY, BARTON, and WRIGHT, JJ.

an order for discovery of documents. The affidavit of discovery made under the said order stated that the defendants had in their possession or power the documents relating to the matters in question in the action set forth in the 1st and 2nd schedules thereto, and that they objected to produce the documents set forth in the said 2nd schedule, on the ground that they were by their nature privileged from production. The said documents were described as "confidential correspondence, reports, notes, minutes, and entries, relating to the 'Harriet Amelia' between the 22nd August and 5th September, 1900, obtained or made by the Liverpool Salvage Association, and their representatives and servants, as agents for the Maritime Insurance Company, in reference to matters arising in litigation then anticipated, and afterwards instituted, by the owner of the 'Harriet Amelia' against the said Insurance Company for the purposes of enabling the said Insurance Company to be advised upon, or defend, the claim made against them." The said correspondence was contained in a bundle marked 'A' and numbered 1–53, and the defendants also objected to produce instructions to counsel, and correspondence between the defendants, the Liverpool Salvage Association, and their solicitor.

The plaintiffs now applied for an order that the defendants should make a further and better discovery of documents.

D. B. Sullivan, K.C., and *Roche*, for the plaintiffs:—

The defendants are not entitled to exemption from discovery of the documents that came into their possession when acting as agents for the Maritime Insurance Company prior to the institution of the action by the shipowner against the insurers. Such documents would not have been privileged in the earlier action; they came into existence prior to the institution of that action, and were not in the nature of legal professional communications. Even if so privileged in the earlier action, such privilege does not attach to the documents in the present action, which is one between new parties, and brought on foot of a distinct cause of action.

W. H. Boyd, for the defendants:—

The documents in respect of which discovery is now sought

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were clearly privileged in the earlier action; they were brought into existence under a reasonable apprehension of an action, or claim, against the Maritime Insurance Company, and it is therefore immaterial that proceedings had not actually been instituted. That being so, the principle of "once privileged always privileged" applies.

[They cited *Bullock* v. *Corry* (1); *Goldstone* v. *Williams, Deacon, & Co.* (2); *Pearce* v. *Foster* (3); *Nordon* v. *Defries* (4); *Calcraft* v. *Guest* (5); *Minet* v. *Morgan* (6); *Collins* v. *London General Omnibus Co.* (7).]

THE COURT inspected the documents in question.

KENNY, J.:—

This is an application that the defendants, the Salvage Association, do make further discovery of documents. The action is one by the County Council of Kerry, in whom are vested the control and management of the pier and breakwater at Knightstown, in Valentia Harbour, and the approaches thereto, for the recovery of damages arising from the acts of the defendants in causing a wrecked vessel, the "Harriet Amelia" to become an obstruction to navigation. The damages are measured by the expenses to which the plaintiffs are alleged to have been put in blowing up the wreck with dynamite. The first-named defendants are a Salvage Association, and the Messrs. Ensor are, I believe, sub-agents of theirs. The defendants deny any liability for bringing the vessel to the place where she lay as a wreck, or for her having become a total wreck or an obstruction to navigation.

The allegation in the statement of claim is that in August of the year 1900 the vessel while on a voyage to Cardiff became a wreck at Ballinskelligs Bay, and that the defendants took possession of her, towed her to Valentia Harbour, and there stranded and abandoned her, and that in consequence of their acts she sank and became a total wreck, and a danger and obstruction to the

(1) 3 Q. B. D. 356.
(2) [1899] 1 Ch. 47.
(3) 15 Q. B. D. 114.
(4) 8 Q. B. D. 508.
(5) [1898] 1 Q. B. 759.
(6) L. R. 8 Ch. 361.
(7) 68 L. T. 831.

navigation. It would appear that in October, 1900, the owner of the vessel—a man named Spillane—brought an action against the Company with which she was insured—the Maritime Insurance Company—for the amount of the policy, and that in that action the Insurance Company paid into Court a sum of £160, which was accepted by Spillane in full for his cause of action. The present action is between another set of parties, and, though arising out of the same circumstances, so far as the wreck is concerned, is in respect of quite a different cause of action.

The defendant obtained the usual order for discovery, and both defendants admitting that they have documents in their possession relating to the matters in question in this suit, claim privilege in respect of certain of these documents. The following is the form of their objections to produce—[His Lordship read the objections and 2nd schedule, *ante*, p. 39.]

In addition, the defendant Ensor says that he had in his possession, but has not now, certain telegrams sent by him to a Captain Pomeroy in August, 1900, and that these telegrams were last in the possession of the post-office.

The notice of motion before us asks that the defendants, the Salvage Association, do make further discovery of the documents referred to in paragraphs 2 and 3 of their affidavit. These documents include instructions to counsel and correspondence between the Salvage Company and their solicitor, and other papers in this present action. It is clear that these are privileged, and that we should not order production of them. Indeed, there was no application made at the Bar with reference to them.

The notice of motion is conversant with another matter, as to which we heard nothing from counsel. It asks that the defendant Ensor shall make further discovery, and furnish copies of the Pomeroy telegrams. We cannot comply with this, for it is obvious that the documents referred to are Ensor's original telegrams handed in at a post-office which, under no possibility, could now be in his possession.

Having disposed of these matters, I come to the substantial question discussed before us, namely, Are the plaintiffs entitled to see these fifty-three documents that came into being in August and September, 1900, at a time when the present cause of action

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Kenny, J.

had not arisen? The ground of privilege in connexion with them is that they are in the nature of professional communications. I shall assume that the reasonable intendment of the claim put forward is that in former litigation—either actual or anticipated—the defendants acted as agents for one of the parties to it, and that these documents contain information of a confidential character given or obtained by the defendants to or for their principal for the defence of an actual suit, or for obtaining legal advice with regard to an anticipated suit. In thus paraphrasing the alleged ground of privilege, I think I am putting the defendants' claim more strongly in their favour than the words of the affidavit of discovery warrant; but I think I may do so, as unless the claim is made a matter of professional privilege, I cannot see that privilege arises at all. In other words, if there was no reference to a state of circumstances which involved the confidential relationship of client and legal adviser, the claim would be reduced to the simple one of the defendants having given or procured the information contained in these documents as ordinary agents for a principal who had no present intention of taking legal advice with regard to the matter with which they dealt. Of this class are the documents which railway and tramway companies are obliged to produce in everyday practice, consisting of reports as to the details of accidents forwarded to them by their engineers, traffic-managers, and other officials. There is no privilege for such documents when they are *ante litem motam*, and not covered by the professional privilege arising from the relationship of legal adviser and client: *Worthington* v. *Dublin, Wicklow, & Wexford Railway Co.* (1). Assuming, therefore, that the claim here is based on the confidential relationship of solicitor and client, the defendants in effect say that their principal, the Maritime Insurance Company, for whom this information was obtained, could decline to show those documents, because the information was obtained in order to be laid before their Company, and if they could decline, we, as their agents, can decline, notwithstanding that there are new parties, and a new cause of action. I think there can be little doubt that if, instead of the Salvage Company, we had the Maritime In-

(1) 22 L. R. Ir. 310.

surance Company, or their solicitors, claiming privilege on the ground of the professional relationship, the claim should be allowed if we were satisfied that the documents were of the character they were represented to be. In such a case we may take it as settled that "once privileged, always privileged": *Minet* v. *Morgan* (1), *Bullock* v. *Corry* (2), *Pearce* v. *Foster* (3), and *Calcraft* v. *Guest* (4). But even in such a case we would probably look at the documents, and see if there was anything inconsistent with the claim made. We have thought it still more essential to do so in the present case, in order to see if any of them came into existence in connexion with a legal adviser, or anticipated or actual litigation. I have read every one of them; and I can see no indication of any sort that the Maritime Insurance Company were at the time threatened with any claim by Spillane, the owner of the vessel, or that they were taking legal advice with respect to the latter, or in any way utilizing the information given by the defendants in connexion with legal advice. A representative of the Salvage Company named Captain Pomeroy had proceeded to Ballinskelligs, and afterwards to Valentia, in connexion with the salvage and repair of the vessel and the disposal of her cargo; and the documents in question consist of telegrams and letters passing between Pomeroy and Mr. Randall, the secretary of the Salvage Company (who makes the affidavit of discovery), on the subject of the condition of the vessel and cargo, and the efforts that were being made to save them and to dispose of the cargo. There is no suggestion of a claim by anyone, unless in one or two letters in September of an unimportant character, which show that the losses of the captain and owner would require consideration. The documents bear inherent indications that the time for taking legal advice had not arrived—that the information was not procured or given for the purpose of being laid before the legal advisers of the Maritime Insurance Company—and that no litigation was then in contemplation. Under these circumstances we must order inspection and copies of the documents in Mr. Randall's affidavit.

(1) L. R. 8 Ch. 361.
(2) 3 Q. B. D. 356.
(3) 15 Q. B. D. 114.
(4) [1898] 1 Q. B. 759.

K. B. Div. 1903.

KERRY CO. C. *v.* L'POOL SALVAGE ASSN. AND ENSOR.

BARTON, J. :—

I am of the same opinion, and have very little to add to the judgment of Mr. Justice Kenny, with which I concur.

This is an application on behalf of the plaintiffs in this action for further discovery and production of certain documents for which the defendants have claimed privilege. The plaintiffs are the County Council of County Kerry, and the defendants are wreck-salvors. It appears that on the 18th August, 1900, a vessel called the "Harriet Amelia" was wrecked on the coast of Kerry. The defendants were employed by the Maritime Insurance Company, a firm of Liverpool underwriters, with whom the ship was insured, to salve the wreck, and they did so by stranding it near the pier of Knightstown, in the harbour of Valencia. The plaintiffs complain that in so doing the defendants caused an obstruction to the pier and harbour, and put plaintiffs to expense in removing the obstruction, and they claim in this action to recover from the defendants these expenses and damages for the obstruction. The documents in question, for which privilege is claimed, consist of the correspondence which passed between the defendants and their principals, the Liverpool underwriters, between the 22nd August and the 6th September, 1900, giving and receiving directions, and reporting progress as to the operations for salving the wreck. Protection is not, and cannot be, claimed for these documents as being confidential communications passing between principal and agent. There is no such privilege known to our law. As Jessel, M.R., said in *Slade* v. *Tucker* (1) :— "I never yet heard of the doctrine of communications between principal and agent being privileged and protected." The privilege which is set up is legal professional privilege, and it is put forward on the following grounds :—It appears that the owner of the "Harriet Amelia"—a Mr. Spillane by name—brought an action against the Maritime Insurance Company, upon his policies of insurance. The action was commenced in October, 1900. The usual questions were put in issue as to total loss, or constructive total loss, and as to the giving of notice of abandonment, and the action resulted recently in October, 1903, in a

(1) 14 Ch. D. 824, at p. 827.

verdict by consent for the defendants without costs. It is suggested that this correspondence was privileged in that action, and that it is, therefore, privileged in the present action. If it was privileged in the other action, the rule "once privileged, always privileged," would come under consideration, and Mr. Sullivan, not having seen these documents, was forced to argue that the well-established general rule does not apply to this case. But it is not necessary for us to decide, or even to express, an opinion upon that question. We have had the advantage of reading the documents. From a perusal of them it seems to me quite clear that these documents were not, and could not, have been privileged in the action between Spillane and the Liverpool underwriters. There is a passage which, I think, exactly covers this case in the judgment of James, L.J., in *Anderson* v. *Bank of British Columbia* (1)—a judgment which has been several times followed and approved, *e.g.* by Brett, L.J., in *Southwark Water Company* v. *Quick* (2). In that case, at p. 656, James, L.J., said that he thought that the authorities were based upon this, "that as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief." He then proceeds—"But that seems to me to have no application whatever to a communication between a principal and his agent in the matter of the agency, giving information of the facts and circumstances of the very transaction which is the subject-matter of the litigation. Such a communication is, above all others, the very one which ought to be produced." It seems to me that those words apply very appropriately to the present case. This correspondence did not come into existence as materials for the brief of the defendants in the case of Spillane against the Insurance Company. On the contrary, it consisted of communications between the Liverpool Insurance Company and their agents, the wreck-salvors, in the matter of the agency, giving information of the facts and circumstances of the very transaction which was the subject-matter of the litigation—namely, the circumstances of the loss of the vessel. Accordingly, it is, in the words of James, L.J., the very kind of correspondence which, above all others, ought to

(1) 2 Ch. D. 644. (2) 3 Q. B. D. 315.

K. B. Div. 1903. KERRY CO. C. *v.* L'POOL SALVAGE ASSN. AND ENSOR.

be produced. That being so, this claim of legal professional privilege falls to the ground, and the application for further discovery and production ought, in my opinion, to be granted.

WRIGHT, J., concurred.

R. ST. J. C.

Appeal. Dec. 4, 7.

The defendants appealed to the Court of Appeal (1).

Campbell, S.-G., and *Boyd*, for the appellants.

Sullivan, K.C., and *Roche*, for the respondents.

THE COURT dismissed the appeal, with costs.

Solicitors for the plaintiffs: *F. & C. Downing.*
Solicitors for the defendants: *Stanuell & Son.*

R. D. M.

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

HEITON & CO. *v.* M'SWEENEY (1).

K. B. Div. 1904. Oct. 31. Nov. 7.

By-law—Lighting of vehicles—Responsibility of owner—Ultra vires—*Reasonableness.*

H. & Co. were convicted under a by-law of the County Council of D., whereby it was provided that, during the period between one hour after sunset and one hour before sunrise, the owner of every vehicle, which should be driven, or be, upon any street or public place should cause to be attached to such vehicle a lamp or lamps, so constructed and placed, and lighted, and kept lighted, as to exhibit an uncoloured light in the direction in which the vehicle was proceeding, and afford adequate means of signalling the approach or position of such vehicle:—

Held (Gibson, J., *dissentiente*), that the by-law was not void for making the master liable to conviction in respect of the *quasi*-criminal omission of his servant, or for unreasonableness, and that H. & Co. were rightly convicted.

CASE STATED by Mr. E. G. Swifte, Divisional Magistrate, for the opinion of the Court upon certain questions arising out of a summons at the instance of Police Constable T. M'Sweeney, 87E, against Thomas Heiton & Co., Limited, for that the defendants, on the 10th day of November, 1903, being the owners of a certain vehicle, to wit, a dray which was upon the Rathmines-road, being a street or public place within the administrative county of Dublin, during the period between one hour after sunset and one hour before sunrise, to wit, between the hours of 6 and 7 o'clock, p.m., did not cause to be attached to such vehicle a lamp so constructed and placed, and lighted, and kept lighted, as to exhibit an uncoloured light in the direction in which said vehicle was proceeding, and to afford adequate means of signalling the approach, or position, of such vehicle, contrary to the form of the statute in that case made and provided. Upon this summons, and upon hearing the evidence, the magistrate convicted the defendants, and imposed a fine of 2*s.* 6*d.*

(1) Before LORD O'BRIEN, L.C.J., and GIBSON and MADDEN, JJ.

K. B. Div. 1904.

HEITON v. M'SWEENEY.

The text of the by-law upon which the prosecution was founded was as follows:—

> 4. During the period between one hour after sunset and one hour before sunrise the owner of every vehicle, which shall be driven or be upon any street or public place, shall cause to be attached to such vehicle a lamp or lamps, so constructed and placed, and lighted, and kept lighted, as to exhibit an uncoloured light in the direction in which the vehicle is proceeding, and afford adequate means of signalling the approach or position of such vehicle.

The case stated was as follows:—At the hearing of the said summons Police Constable Timothy M'Sweeney, 87E, the complainant, deposed as follows:—"Between 6 and 7 p.m. on the 10th November, 1903, about 6.20 p.m., I found a horse and cart on the Rathmines-road without a lighted lamp. There was an unlighted lamp on the cart. The name on the cart was Thomas Heiton & Co., and the driver said they were the owners. Joseph Mills was the driver in charge of the cart."

It was admitted by the complainant, on the hearing, that there was attached to the vehicle a lamp properly placed for the purpose of having the same lighted. It was also admitted that, when the complainant so found the horse and cart, it was more than one hour after sunset. The case was fully argued before me by counsel representing the complainant and defendants. The only question of law argued before me was whether, under the circumstances of the case and the existing law and statutes, the by-law under which the complainant proceeded was *ultra vires*, on the ground that it violates a principle of law in making a master criminally liable for his servant's offence, and is unreasonable. I overruled the points so raised on behalf of the defendants, and made the order hereinbefore referred to, and hereupon the judgment of the Court is required as to whether I, the said Justice, was correct in point of law in my determination as aforesaid, or as to what should be done in the premises.

For the detailed grounds of my decision, I beg leave to refer to my written judgment in the case, which is reported in 4th New Irish Jurist, p. 126 (the number for 25th March, 1904).

ERNEST G. SWIFTE.

William M'Grath (with him *Serjeant Dodd*), for the defendants :—

The by-law purports to make the master criminally responsible for the act or default of his servant. In that it is inconsistent with, and repugnant to, the general principles of the law. The County Council was not authorized by statute to make such an exception, nor does the case come within the principle of any other of the exceptions which have been sanctioned by the Courts. All the Acts dealing with vehicles on public roads show that the Legislature adheres to the general principle in regard to them. See 14 & 15 Vict. c. 92, sections 11–13; Dublin Carriage Act (16 & 17 Vict. c. 112), s. 34; Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 2; *Sherras* v. *De Rutzen* (1); *Chisholm* v. *Doulton* (2). The case on which Mr. Swifte has come to his decision—*The St. Helen's Tramway Co.* v. *Wood* (3)—was one in which the statute authorized the particular regulation, and provided that for breach of it the Company, and not the servant, should be liable. Most of the exceptions to the general principle are due to the difficulty of enforcing some statutory or common law obligation, without making the master liable. But here there is no such difficulty. On the contrary, a by-law making the servant liable for lighting the lamp, and the master liable for supplying it, would be more effective. And this is the form adopted by other local authorities, as shown not only by the by-laws of Dublin city and other Irish counties handed in to Mr. Swifte, but also by the cases on the subject of lights on vehicles, viz.: *Walker* v. *Stretton* (4); *Williams* v. *Groves* (5); *Adamson* v. *Miller* (6). This by-law is not only *ultra vires*, but it is unreasonable. The prosecution is a criminal one, inasmuch as under 3 & 4 Vict. c. 108, the magistrate had power, if the fine was not paid, and if there was not sufficient distress, to imprison: *Queen* v. *Sullivan* (7).

(1) [1895] 1 Q. B. 918.
(2) 22 Q. B. D. 736.
(3) 56 J. P. 70.
(4) 12 T. L. R. 363.
(5) 12 T. L. R. 450.
(6) 16 T. L. R. 185.
(7) I. R. 8 C. L. 404.

K. B. Div. 1904.

HEITON v. M'SWEENEY.

Clancy, for the County Council :—

In determining the validity of by-laws made by public representative bodies, such as County Councils, the Court is slow to hold that a by-law is void for unreasonableness. A by-law so made ought to be supported, unless it is manifestly partial and unequal in its operation, between different classes, or unjust, or made in bad faith, or clearly involving an unjustifiable interference with the liberty of those subject to it : *Kruse* v. *Johnson* (1). The statutes and cases in which an inroad has been made upon the principle that a master cannot be made criminally liable for the act of his servant are so numerous, that it cannot be said that it is any longer a general principle of law. The County Council has chosen the most effective way of carrying out the intention of Parliament. It is not harsh on the master, because, if he took all reasonable precautions, the penalty would be nominal. [The following additional cases were referred to : *Howells* v. *Wynne* (2) ; *Collman* v. *Mills* (3) , *Newman* v. *Jones* (4) ; *St. Helen's Tramway Company* v. *Wood* (5).]

Serjeant Dodd, in reply.

Cur. adv. vult.

Nov. 7.

MADDEN, J. :—

The question, in this case, is as to the validity of a by-law made by the County Council of Dublin under the provisions of the Acts which have been referred to. The by-law is in the following terms :—"During the period between one hour after sunset, and one hour before sunrise, the owner of every vehicle, which shall be driven or be upon any street or public place, shall cause to be attached to such vehicle a lamp or lamps, so constructed and placed, and lighted, and kept lighted, as to exhibit an uncoloured light in the direction in which the vehicle is proceeding, and afford adequate means of signalling the approach or position of such vehicle." Adopting the language of Lord Russell, C.J., in *Alty* v. *Farrell* (6) :—"I am most unwilling,

(1) [1898] 2 Q. B. 91.
(2) 32 L. J., M. C. 241.
(3) 13 T. L. R. 122.
(4) 55 L. J., M. C. 113; 17 Q. B. [D. 132.
(5) 56 J. P. 70.
(6) [1896] 1 Q. B. 636.

when it can be avoided, to interfere with the exercise by a local authority of the powers entrusted to them by such an Act as this"; and I think it can be fairly avoided in the case before us.

The by-law before us is said to be *ultra vires*, inasmuch as it contravenes a settled principle of law, and also inasmuch as it casts an unreasonable burden on the owners of vehicles. The former objection is completely disposed of by the decision of the Court of Queen's Bench in England in *The St. Helen's District Tramway Co.* v. *Wood* (1). It is not necessary, in order to convict under the by-law, to attribute to the owner of a vehicle the *mens rea* of his servant, for the simple reason that the principle of *mens rea* does not enter into consideration when a man is fined for omitting to light a lamp in obedience to a by-law, although the procedure may be governed by the rules applicable to criminal cases properly so called.

But is it so unreasonable to make the owner responsible for the continuous lighting of the lamp attached to a vehicle, which may not be at the time of the alleged offence in his possession, or under the control of a servant for whose negligence he would be responsible at Common Law, as to render the by-law *ultra vires*? No doubt the effect of the by-law is to make the owner responsible in a *quasi*-criminal proceeding in respect of an act or omission for which he could not otherwise be called to account. But this consideration applies to the part of the by-law which is admittedly *intra vires*. The owner must cause to be attached to the vehicle a lamp so constructed and placed as to exhibit an uncoloured light in the direction in which the vehicle is proceeding. A lamp once attached to an ordinary vehicle does not remain thereon for ever. Ordinarily, it is no part of the structure, but placed, when required, in a socket. If it is attached to a carriage when used in broad daylight, it is more for ornament than for use (a matter on which opinion differs), and everyone knows that lamps are not always so attached. If it is illegal, on principle, to penalise the owner for not keeping a lamp lighted, I cannot see how he can be lawfully made responsible for the lamp being always kept in its socket. It

(1) 60 L. J., M. C. 141.

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seems to me to be a question not of principle, but of degree. I should have thought a by-law similar to that adopted in the city more reasonable, as well as more effective, for there is never any difficulty in identifying the driver of an unlighted vehicle. But I am not at liberty to substitute my judgment for that of the proper authority, the County Council. Weighty reasons might be given —and were given in the case to which I have referred—for making the owner solely responsible for the protection of the public using the highways, and I am not prepared to hold that the order before us is so plainly unreasonable as to be *ultra vires* on that ground.

GIBSON, J. :—

Unless the by-law is unreasonable, it cannot be impugned. It appears to be copied from a by-law relating to the driver of a vehicle, the word "owner" being substituted for "driver." Counsel for the defendants assert that in no reported case, in no known precedent in any collection of standard by-laws, and in no statute, can there be found an example like this, making the owner absolutely and in every case liable personally for the default of his servant in the management and conduct of a vehicle. Under the by-law as it stands, the blameworthy servant goes free. The only part of the by-law challenged in argument was the expression "kept lighted," under which the defendant was convicted. The objection is really wider, and relates to the whole by-law; it must apply to the absolute obligation to attach the lamp and light it, as well as keep it lighted. The ordinary type of by-law is exemplified in *The Kent County Council* v. *Humphrey* (1), where, under a statute authorizing by-laws requiring a weighing instrument to be carried with a coal cart, the by-law required every coal-dealer to provide the weighing apparatus, and the carter was required to carry it with him. The ordinary type of legislation imposes the duty on the person in charge of the vehicle (*e.g.* 59 & 60 Vict. c. 36, s. 2). The argument for the defendants is that an owner cannot reasonably be asked to do more than engage competent servants, supply fittings and lamps, and give proper direction to his servants for their use.

(1) [1895] 1 Q. B. 903.

After much consideration I have come to the conclusion that the by-law is unreasonable. It purports to create (it is admitted) an absolute and unqualified obligation on every owner to have lamps supplied lighted, and kept lighted, and the owner cannot escape liability, though he has done everything humanly possible to secure obedience to the by-law. Take the following case which, according to the apparent construction of the by-law (counsel for the prosecution admit), would come within it. A master is not civilly or criminally responsible for the action of a driver not engaged in his master's business (*Saunderson* v. *Collins* (1)). A coachman before sunset drives his master to the train in a carriage properly fitted with lamps and candles; having left him there he goes on a journey for his own purposes. Night falls, and in consequence of the driver's negligent omission to light the lamps, there is an accident. The master in such a case would not be liable civilly or criminally, yet he would, as owner, be liable under this by-law, which does not purport to be confined to the use of the vehicle on the owner's business. Take a second case: a vanman, from malicious motives during a strike, omits to light his van in order to get his employer prosecuted. On the prosecutor's argument, the owner would be responsible. Yet the general rule of law is that the wilful and intentional misconduct of a servant would not impose responsibility on his master, for in such a case the servant would not be acting in the course of his duty. A gamekeeper shooting anyone intentionally, or a groom wilfully riding down someone he disliked, would not thereby make his employer answerable, though the latter would be liable for his servant's negligence in the scope of his employment. In these two cases it would seem to be highly unreasonable to punish the master, and let off the guilty servant. Where the servant is not acting in the course of his duty, he is for the time being not a servant at all, and his acts are trespassory. Where the master has done everything that he can to comply with the by-law, secured proper servants, supplied lamps, candles, &c., and has given orders to attach and light them, it seems to me unreasonable that he should be punishable for acts of his servant outside the scope of

(1) [1904] 1 Q. B. 628.

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duty, and for wilful misconduct, or gross negligence. It is not fair that a master should be made insurer, and become criminally responsible for acts he cannot prevent. The argument that the by-law will compel masters to get trustworthy servants, and is therefore reasonable, is not sustainable. No matter what pains may be taken in the choice of a servant, his employer must answer for the omission to light. A good servant may occasionally forget.

I do not deem it necessary to discuss the authorities cited in reference to statutes where no question of reasonableness can arise. The only inquiry there is, what is the declared intention of the Legislature—whereas in by-laws the vital question is reasonableness. The tramway case on which the magistrate based his decision seems to me clearly distinguishable. That case related to statutory regulations which had the same efficacy as the special Act of Parliament, and the subject-matter was a tramway owned by a Corporation and worked by its servants, as to which most of the difficulties I have pointed out would not arise. The by-law before us relates to all owners, and extends to all sorts of vehicles (other than farm vehicles) going on any thoroughfare for any purpose. It is so expressed as to be of universal obligation, and no limitations are stated or can be implied. There is no definition of owner, and the term must be understood in its usual sense. If mere ownership brings the proprietor within the obligation of the by-law, it is unreasonable. That is (as counsel construes it) the effect of the by-law. An owner who may be certainly free from blame must be punished; and the person in charge, who is proved to be alone guilty, cannot be. The difficulty has been caused by taking a form of by-law applicable to the case of a driver, and substituting therein the owner for the driver. It is inconvenient that the county and the city should be subject to different codes, only the owner being liable in the county, and only the driver in the city.

LORD O'BRIEN, L.C.J.:—

I might rest content with saying that I agree with my brother Madden for the reasons he has assigned for his judgment; but as the case has been ably and elaborately argued by Serjeant Dodd

and the counsel associated with him, I think it right to add a few words. I never had any doubt about the case, and I remain in that condition. It is said that there is no by-law like this in any other part of the country. The reason for its existence may be that the by-laws generally in use were ineffective. I could not set aside this by-law, unless I thought it obviously and palpably unreasonable. On the contrary, I think it reasonable. It is sought to cast some reflection on the County Council; but I think there is no ground for this. I think they had in their mind the good government of the county, and the protection of the public. It is not to be lost sight of, when minute criticisms are made and hypothetical cases are suggested, that the paramount object of the Legislature and the County Council was the protection of the public.

The question is, Is the by-law valid which makes the owner of a vehicle exclusively responsible for that vehicle not having been kept lighted? Is it reasonable, having regard to the fact that the owner may be made exclusively responsible for the default of his servant? Let me see, then, what power the County Council has. *Ex concessis*, it has power to make regulations for the good rule and government of the county; and *ex concessis*, it is within its power to make regulations as to the lighting of vehicles. It has power, concededly, to provide that vehicles shall be lighted in the way prescribed, and that the apparatus for lighting shall be kept lighting. But it is said that the by-law is bad because it imposes a penalty on the owner for the default of a servant. I was, throughout, and am now, of opinion that it cannot be assailed upon this ground, the only ground of impeachment. Why do I think so? Because, in my opinion, making the owner exclusively responsible is the most effectual way of securing that the lighting apparatus shall be kept lighted. Exclusive responsibility on the part of the owner shall assure that he selects and keeps in his employment sober and dutiful servants, and that he exercises a vigilant control over those servants. If the misconduct of the servant is brought home to the master by the master being made personally responsible, the servant will be dismissed, or some salutary corrective administered. Making the owner exclusively responsible assures that the vehicle shall be entrusted to competent, capable, sober, well-conducted, and dutiful servants, and to discreet and careful

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friends. This provision is, in my judgment, in the interest of the master and of the servant and of the public. The master will select his servants the more carefully, the servants will serve the master the more dutifully, and the public will be the more effectually protected. The regulation is not necessarily—is not, in point of law, necessarily—invalid because it imposes a penalty on the master; the question is whether the particular regulation is reasonable; and for the reasons I have assigned, I am of opinion that it is reasonable.

Solicitor for Heiton & Co.: *James Brady.*
Solicitor for the County Council: *W. J. Shannon.*

J. L.

COHEN *v.* RUDDY (1).

Appeal. 1904. Nov. 24.

Practice—Equitable execution—Application by judgment creditor to be appointed receiver over rents of houses the property of the defendant.

The defendant was the owner of two houses at T., in the county of Galway, one of which was let as the police barracks at £30 a year, and the other was let at £24 a year. The rent payable by the defendant for the plot of ground on which the houses were built was £1; the taxes payable in respect of the barracks was £2 13*s.*, and in respect of the other house 11*s.* The plaintiff was a judgment creditor, who had issued a writ of *fieri facias* against the defendant, to which there was a return of *nulla bona.* Plaintiff applied that he should be appointed receiver by way of equitable execution:—

Held (affirming the decision of Kenny, J.), that the application should be refused.

Orr v. *Grierson* (28 L. R. Ir. 20) distinguished.

MOTION by plaintiff, that he be appointed receiver, by way of equitable execution, over the rents of two houses in the town of Tully, and county of Galway. On the 8th August, 1904, the plaintiff obtained judgment against the defendant for £28, and £6 14*s.* 4*d.* for costs. A writ of *fieri facias* had been issued on foot of the judgment, to which there was a return of *nulla bona.* The defendant, James Ruddy, was the owner of the police bar-

(1) Before FITZ GIBBON, WALKER, and HOLMES, L.JJ.

racks in Tully, in the county of Galway, from which he received from the Royal Irish Constabulary an annual rent of £30, payable half-yearly, on the 4th January and 4th July, and was also the owner of licensed premises in the said town in the occupation of one John Connolly, from whom he received an annual rent of £24, payable half-yearly, in May and November.

Appeal. 1904. COHEN v. RUDDY.

In a supplemental affidavit the plaintiff stated that the defendant, James Ruddy, held the plot of ground on which both houses were built at the yearly rent of £1 ; that the valuation of the constabulary barracks was £15, and the taxes about £2 13*s.*; the valuation of the licensed premises was £2, and the taxes about 11*s.*

Kenny, J., refused the application on the ground that the rents over which the plaintiff sought to have himself appointed receiver were not net rents in respect of which a receiver by way of equitable execution could conveniently be appointed by the King's Bench Division.

The plaintiff appealed.

R. W. Pringle, for the appellant, referred to *Orr* v. *Grierson* (1).

FITZ GIBBON, L.J. :—

In this case the plaintiff has two other remedies, at least. One is to get an order to pay by instalments, and then, if the defendant fails to pay, he can get a committal order against him. The other is to register his judgment as a mortgage, and serve notice on the tenants to pay their rents to him. The expense of either of these remedies cannot be much, if at all, greater than that of proceeding for a conditional order to appoint the plaintiff receiver over the rents. Cause might be shown against that by the tenants, by the head landlord, or by the defendant.

It is not the practice of the King's Bench to appoint a plaintiff a receiver by way of equitable execution, unless where it is proved that all the money that can come to his hands under the execution will be the money of the defendant. Here, to the

(1) 28 L. R. Ir. 20.

Appeal 1904.

COHEN *v.* RUDDY.

extent, at least, of the head landlord's rent, it is not the money of the defendant. The King's Bench considers that it has no machinery to control a receiver appointed by way of equitable execution, or to make him account for money to be disbursed to third parties. Under these circumstances we think that Kenny, J., was justified in declining to give the order, though the amount which the receiver would have had to pay out of the proceeds of his execution would have been small.

WALKER and HOLMES, L.JJ., concurred.

Solicitor for the plaintiff: *W. F. Webb.*

R. D. M.

K. B. Div. 1904.

April 30.

Appeal. June 14.

TOBAKIN *v.* DUBLIN SOUTHERN DISTRICTS TRAMWAYS CO. (1).

(1904. No. 981.)

Practice—Privilege—Discovery—Report by agent of defendant.

In an action claiming damages for negligence the defendants, by their affidavit of discovery, claimed privilege in respect of a document mentioned in the schedule thereto. The said document consisted of a report drawn up by an agent of the defendants, who, three days after the occurrence complained of in the action, called upon the plaintiff, and took down his evidence in writing. The document was (the defendants alleged) read over on completion to the plaintiff, and was admittedly signed by the plaintiff as a marksman:—

Held, that the defendants were not entitled to exemption from discovery in respect of the said document.

MOTION ON NOTICE.

The action was brought by the plaintiff against the defendants to recover damages for injuries alleged to have been sustained by him through the negligence of the defendants or their servants.

The plaintiff applied for and obtained the usual order for discovery of documents, and in an affidavit sworn under the said

(1) In the King's Bench Division, before GIBSON and BOYD, JJ.

order the defendants' secretary stated that he had in his possession or power the document relating to the matters in question in the action, set forth in the schedule thereto, and that he objected to produce the said document on the ground that it came into existence, and was obtained, "solely for the purpose of being communicated to, or for the use of, the defendants' solicitors, in anticipation or view of litigation in respect of the alleged occurrence relied upon by the plaintiff in this action, under a reasonable apprehension of an action or claim against the defendants, or for obtaining, for the use of the said solicitors, evidence to be used in anticipated litigation, or information as to evidence which could be obtained for such purpose, for the use of the said solicitors, to enable them to conduct or advise the defendants whether to defend such litigation, or not, and, at the instance of the said solicitors, and by the directions of the defendants, for communication to the said solicitors, with a view to the defence of such litigation."

The document in question was described in the schedule as—"Statement made on the 7th day of December, 1903, at the request of Inspector D. Kerr, of the defendant Company (who called upon the plaintiff at his residence, No. 16, Warren-street, South Circular-road, in the city of Dublin, for the purpose of taking such statement, and so informed the plaintiff before he made the same or any statement), by the plaintiff to the said D. Kerr, and by him taken down in writing then and there, and read over upon completion by the said D. Kerr to the plaintiff, and stated by the plaintiff to be correct, and thereafter signed willingly and without objection by plaintiff, by affixing thereto by the plaintiff of his mark in the presence of the said D. Kerr upon the said date."

The plaintiff now moved for an order that the defendants should make and file a further and better affidavit of documents, and for an inspection of the document mentioned in the schedule.

In support of the motion an affidavit was sworn by the plaintiff, in which he stated that on the 7th day of December, 1903, being three days after the date of the accident for which the action was brought, the agent of the defendant Company called at his house when he was in bed and suffering from the effects of

K. B. Div. 1904.

TOBAKIN v. DUBLIN S. D. TRAM CO.

the accident; that the agent stated that he had come to get particulars of the accident; that he then interviewed the plaintiff as to same, and wrote something down on a sheet of paper, which he asked the plaintiff to sign, and on which the plaintiff put his mark, being unable to write; that the said document was not read over to him, and that he was entirely ignorant of its contents.

Horan, for the plaintiff.

Littledale, for the defendants.

[They cited *Price* v. *Harrison* (1); *Learoyd* v. *Halifax Joint Stock Banking Co., Ltd.* (2); *Underwood* v. *Secretary of State for India* (3).]

GIBSON, J.:—

This case raises a novel point. I suppose that the Insurance Company, who are fighting the case for the defendants, think that a question of principle is involved, which makes it desirable to withhold the document in question.

The plaintiff, who is a marksman, has brought his action in respect of injuries received in an accident which he attributes to the negligence of the defendants. There are some statements in the affidavit of the plaintiff which are, I think, in excess of the truth; but the result of the entire evidence appears to be this:— A man named Kerr, on behalf of the defendants, waited on this marksman, obtained from him a statement as to the manner in which the accident occurred, which Kerr wrote down, and he got the plaintiff to sign the document as a marksman.

Are the defendants at liberty to say that they will not allow the plaintiff to see this document so signed, on the ground that it is a privileged communication which they got from him for the purposes of litigation? Stated in that bald form the proposition is repugnant to common sense. Suppose they had a receipt signed by the plaintiff, alleged to be in settlement of the action for a certain sum: that would be a document which would have come into existence for the purpose of avoiding litigation. Could the

(1) 8 C. B. (N. S.) 617. (2) 68 L. T. (N. S.) 158. (3) 35 L. J., Ch. 545.

defendants claim privilege for such a document? My view of the question is, that the plaintiff has got an interest in the paper as well as the defendants. He is to be bound by it; and if he is not to see it, he may be taken by surprise at the trial. This document, to which they have bound him by his signature, is one in which he has got an interest: it is his document so far as his signature is attached to it.

The defendants cannot claim exemption from discovery simply by stating that they extracted it from the plaintiff for the purposes of their own defence. None of the authorities mentioned touch this point, or come near to touching it.

We must order the defendants to make further and better discovery.

BOYD, J., concurred.

R. ST. J. C.

The defendants appealed to the Court of Appeal.

Littledale, for the appellants.

THE COURT OF APPEAL (FitzGibbon, Walker, and Holmes, L.JJ.) dismissed the appeal without calling on *Horan*, for the respondent.

Solicitor for the plaintiff: *H. Horan.*
Solicitors for the defendants: *Hoey & Denning.*

R. D. M.

Appeal.
1904.
July 4, 8.

MARTIN *v.* SHERRY (1).

Solicitor—Costs—Solicitors (Ireland) Act, 1898 (61 & 62 *Vict. c.* 17), *s.* 48.

P. and P., junior, who were father and son, carried on business together as solicitors at Armagh, under the name of J. E. P. & Son. P., junior, had served his apprenticeship to his father, and had been admitted a solicitor about five years. There was no deed of partnership between them, no division of profits, and no accounts of profits between them.

An action was commenced in 1902 by the plaintiff, with J. E. P. & Son as his solicitors. It was tried at Belfast at the Summer Assizes for 1902, and resulted in judgment for the plaintiff for £105 and costs.

By an oversight of the town agent of J. E. P. & Son, in Dublin, the duty was not paid on the license of P., junior, for the year 1902, and it remained unpaid till October, 1902, when the omission was discovered and the money was paid; but the license for the certificate of P., senior, was paid.

On taxation of the costs the defendant objected to such of the items of the bill of costs as represented work done while the duty on the license of P., junior, remained unpaid. P., senior, deposed that all the work in the case had been done by himself:—

Held (affirming the decision of Boyd, J.), that P., senior, was entitled to recover the entire of the costs.

The action was brought by the plaintiff as a stockbroker for money due to the plaintiff on an account furnished by him. The writ of summons was issued on the 14th May, 1902. The action was tried by Barton, J., and a special jury, at Belfast, on the 30th and 31st July, 1902; and the jury having answered the questions submitted to them, the Judge referred the plaintiff's claim to the Master to take an account of what was due to him, but refrained from giving judgment.

Both plaintiff and defendant moved for judgment, and in the result judgment was entered for the plaintiff for £105 with costs. The solicitors for the plaintiff were Joshua E. Peel and John A. Peel, of Armagh, who carry on business as "Joshua E. Peel & Son," and when their costs came before the Taxing Officer, the defendant

(1) Before Lord Ashbourne, C., and Holmes, L.J.

objected to the items in their bill of costs from 1 to 165, on the ground that they were incurred between the 14th February and 17th October, 1902, during which period no license was taken out for Mr. John A. Peel.

It appeared that Mr. Joshua Peel had been practising as a solicitor for over thirty years: Mr. John Peel (his son) had been admitted in Hilary Sittings, 1897. On the 6th February, 1901, Mr. Peel sent up to his town agent the money to pay for the stamp duty on the certificate of himself and his son, £6 and £6. The town agent paid the stamp on the license for Joshua Peel, but with respect to John Peel he raised the point that as the latter was not four years admitted he was liable to a duty of £3 only. The officer at the Stamp Office refused to accept payment of the smaller amount, and the town agent intended to contest the matter, as Mr. John Peel had been admitted on the 13th February, 1897. The matter, however, passed out of his mind, and was forgotten, and he omitted to inform Mr. Peel. In 1902 the town agent proceeded to pay the duty for both the Messrs. Peel for that year, when the officer at the Stamp Office pointed out that the duty for Mr. John Peel for 1901 had not been paid, and he refused to take it. The matter was afterwards settled through the Incorporated Law Society, and the duty was paid on the 17th October, 1902.

Mr. Joshua Peel, in his affidavit, stated that though the business was carried on under the name of "Joshua E. Peel & Son," there was no partnership subsisting. No deed of partnership was ever signed, no partnership accounts were made out, and there was no division of profits between him and his son, but the latter received certain payments from him. He personally conducted the action, wrote all the letters in connection with it, took all the instructions, and advanced all the money for the necessary expenses.

It was stated on behalf of the defendant that Mr. John Peel had taken some part in the conduct of the action; that when defendant's solicitor attended at Mr. Peel's office to obtain inspection of documents, Mr. John Peel attended and produced the documents, and that he attended at the trial at Belfast, and also in Dublin on the new trial motion, and at the hearing of the appeal in the Court of Appeal. It was also stated that all civil bills issued

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by the plaintiff's solicitors in 1902 were signed by "Joshua E. Peel & Son," and that the great majority of these were attended to at the Quarter Sessions Courts of Armagh by John A. Peel.

The Taxing Officer disallowed the items in the bill of costs objected to on the ground that during the time when the said costs were earned, one member of the solicitors' firm had not obtained his stamped certificate. The plaintiff's solicitors having filed objections to this ruling, on a motion to the King's Bench to review his decision, Boyd, J., reversed the decision of the Taxing Officer, and from that order the defendant appealed.

O'Brien, K.C., and *E. Cuming*, for the appellant :—

In taxing a solicitor's bill of costs, items relating to business done while the solicitor had not a certificate must be disallowed : *Edmonson* v. *Davis* (1) ; *Re Sweeting* (2) ; *Kent* v. *Ward* (3). In this case the two solicitors were partners ; the name under which they transacted their business was "Joshua E. Peel & Son," and all the Quarter Sessions business of the firm during 1902 was carried on by John A. Peel, and the only way he could have done that lawfully was by being a partner. The firm were working this case, and one partner cannot recover the entire amount of the costs : *Christophers* v. *White* (4) ; *Clack* v. *Carlon* (5).

Serjeant Dodd, Matheson, K.C., and *Davison*, for Joshua E. Peel :—

There was no partnership here—the test of that would be, was Mr. John A. Peel the agent of the firm, so as to bind the firm ? Clearly he was not. Mr. Joshua E. Peel conducted the entire of this case, and is entitled to recover these costs. The Court would permit a solicitor to deliver a fresh bill where there was a mistake in delivering a joint bill : *Matchett* v. *Parkes* (6) ; *Barnard* v. *Gostling* (7). In *Williams* v. *Vere* (8), a solicitor, who carried on business in his own name, and also in the name of O. & Co., was held entitled to recover costs in an action in which

(1) 4 Esp. 14.
(2) [1898] 1 Ch. 268.
(3) 70 L. T. (N. S.) 612.
(4) 10 Beav. 523.
(5) 7 Jur. (N. S.) 441.
(6) 9 M. & W. 767.
(7) 2 East, 569.
(8) 10 T. L. R. 477.

O. & Co. acted as plaintiff's solicitors, though O. was not a qualified solicitor. *Appeal.* 1904.

If John A. Peel was a partner, the omission to take out his certificate *ipso facto* dissolved the partnership, because it became impossible to carry it on lawfully, and Joshua Peel, as surviving partner, had a right to sue in the firm's name. Any act which makes an agreement incapable of performance dissolves the agreement: *Esposito* v. *Bowden* (1). MARTIN v. SHERRY.

LORD ASHBOURNE, C.:—

July 8.

This case, which comes before us on appeal from the King's Bench Division, raises a novel and interesting question. The plaintiff, in an action against the defendant, recovered a sum of £105 and the costs of the action. On the taxation of the costs, the defendant raised the objection that under sect. 48 of the Solicitors Act, Ireland (61 & 62 Vict. c. 17), portion of the costs was not recoverable, as one of the partners in the firm of the plaintiff's solicitors was not registered, and had not paid his license during portion of the time that the action was proceeding. That section, which corresponds with one of the sections of the English Act, is as follows:—"No costs, fee, or reward, or disbursement on account of, or in relation to, any act or proceeding done or taken by any person who acts as solicitor without having previously obtained a stamped certificate, then in force, shall be recoverable in any action, suit, or matter, by such person, or any other person, whomsoever."

That section is sought to be used in this case not only to prevent an unregistered solicitor from recovering costs, but to prevent a fully registered solicitor from recovering costs. It is noteworthy that the term "partner," or "partnership," is not to be found in the section; but I venture to think that the Legislature would be surprised if they heard this section used as the foundation of the argument addressed to us. Once we master the facts of the case, the application of the law to those facts becomes extremely simple, and the law itself plain.

Mr. Peel, senior, is a solicitor of position and standing in Armagh; and his son, who had been apprenticed to him, was

(1) 7 E. & B. 784.

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admitted a solicitor some seven years ago, and has since been working with his father. Nothing was proved to establish a partnership between them: there was no deed of partnership, but his name was added to that of his father in the conduct of the business. At the commencement of 1902, while this action was going on, the father and son both applied to have their licenses taken out in proper time, through their Dublin town agent, in the usual way, and the money to pay for them was sent up. The father's license was taken out; so his position is impregnable; but the son's license was not taken out till October, though it was admitted by the town agent that the money to pay for it was sent up at the same time as the other. There was no default by Mr. Peel, senior, or his son; but it was the *laches* and neglect of the town agent. There was absolute *bona fides*; it is not a question of cunning, or an attempt to keep back the stamp duty. They both intended to be registered, and they both believed they were registered, and it was not till October, 1902, that the town agent found out that he had neglected to pay the duty in the case of Mr. Peel, junior. But all through the father, who was *dominus* of the business, was licensed.

When the plaintiff proceeded to recover his costs, through the agency of his solicitor against the defendant, the defendant said—You will get no costs; true, that all the costs were earned; true, that the labour was expended; true, that the expenditure was incurred in trying to earn them, but all that must go in vain. Mr. O'Brien did not press anything unduly: he contended that the law awarded costs, in a certain condition and no more; and that was quite a legitimate way to present the case.

Mr. Peel, on the other hand, says—So far as the law goes, I alone am to be regarded, as I am alone registered, as a solicitor; but if you rely on the partnership, I say that it was superseded or suspended during the time that my son's license duty was not paid, and, as a matter of fact, I did all the work in the case: it is true that my son was there in the office, but this was a heavy case, requiring the judgment and experience of a senior member of the profession, and I did all the work.

Now, there are many kinds of partnership, as everyone knows. There may be a partner only in name, or a partner without having

his name in the firm; there may be a sleeping partner, or a partner who is only a clerk. What was the position of the son in this case? There was no deed of partnership; there was no division of profits; there was nothing but the addition of the son's name to the father's in the business and in legal documents. I think the partnership was merely verbal or titular, and there was nothing to prove its existence except some payments made by the father to the son, to keep him going. It is true that the son ceased to be a solicitor entitled to recover costs during the time that his license duty was not paid; but the son is not seeking to recover any part of the costs, and the argument put forward here was that while the son was not licensed till October, 1902, that would suspend the partnership, and that we should regard it as suspended.

Reading sect. 48 by the light of the facts, is there anything more than to disqualify the son while trying to recover? Is there anything to say that the fully qualified father cannot recover for work which he did entirely himself, or was responsible for all through? I think it would be the hardest thing ever known to hold that he cannot recover money duly earned, for work duly done, and expenditure properly incurred, because there was a mistake by the town agent in not taking out the son's license; and I cannot see anything in the section to prevent Mr. Peel, senior, from recovering the costs. I test the case in this way. Suppose that Mr. Peel, senior, sued the plaintiff to recover solicitor and client costs, would the plaintiff be listened to if he raised the defence that the son's license was not taken out, while he saw Mr. Peel, senior, doing the work in the case, and he knew that the expenditure was being incurred?

If any such point were raised against the father by his own client, in my opinion it would be held bad and of no avail. I am of opinion that on the law and facts of the case Mr. Peel, senior, is entitled to recover these costs, and that it would be a gross injustice to refuse them.

HOLMES, L.J.:—

The 48th section of the Act of 1898 is a drastic piece of legislation. It provides that no costs, fee, reward, or disbursement, on account of any work done by a person who acts as a solicitor

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without having previously obtained a stamped certificate, then in force, shall be recoverable by such person, or *any other person whomsoever*. It follows from the final words that where a plaintiff or a defendant has obtained a judgment for his costs of suit, he cannot recover them from his adversary if his own solicitor, while doing the work, has been without the certificate required by law. This is undoubtedly hard upon a client who has probably made large advances on account of costs during the progress of the suit, and who was as little likely to inquire about his solicitor's stamped certificate as about his certificate of vaccination. Still, there is no escape from the section of the statute, and the only question for our decision is whether the present case can be distinguished from that of a litigant whose sole solicitor is uncertificated. Counsel for the appellant say that it cannot—that a firm of solicitors, consisting of two members, acted for the plaintiff, that every act and proceeding in the action is to be regarded as done and taken by both, and that as one was without the required certificate, no costs in relation to the work of either can be recovered. If the assumption of fact underlying this proposition is accurate, it is possible that the legal inference is correctly stated.

Mr. Matheson has contended that where there are two solicitors in partnership, each doing his share of the business of the firm, and receiving his share of its profits, the fact that one is without a certificate will not prevent the other from suing in his own name for the costs payable in respect of all the work. I remained unconvinced at the end of his argument; but as it is not necessary to decide this question in the present case, I leave it open for consideration if it should arise hereafter.

The ground on which I am prepared to dismiss this appeal is the view I take of the position of Mr. John Peel in his father's office. I have carefully considered Mr. Joshua Peel's candid affidavit, and I have formed the opinion that his son is in no sense of the word a partner in the business. Mr. John Peel, on being admitted a solicitor, was asked by his father to assist in the business. He continued to live in his father's house as a member of the family, and was, I doubt not, liberally provided for; but he was given no share in the business, which continued to be the sole property of Mr. Joshua Peel. He was not entitled

to any share in the profits, and his services resembled those of a good assistant, save that filial duty and probably an expectation of future advantages took the place of immediate remuneration. It is true that the business was carried on in the name of Peel & Son; but this gave the young man no interest in the earnings of the office. As a matter of fact, all the work in this action was done by, or under the direction of, the father, and the costs in respect thereof were payable to him alone.

Considerable difficulty was created in my mind by the first paragraph of Mr. Joshua Peel's affidavit, which states that the two gentlemen were the plaintiff's solicitors on the record; but on reflection I think that it would be unjust to fasten on these words a meaning which would be inconsistent with the true facts.

For these reasons, I hold that the appeal ought to be disallowed.

Solicitors for the plaintiff: *Joshua E. Peel & Son.*
Solicitor for the defendant: *James Duff.*

R. D. M.

FRANCIS STAUNTON MASSY DAWSON *v.* THE COMMISSIONERS OF INLAND REVENUE (1).

K. B. Div.
1904.
May 12.

Revenue—Stamp Act, 1891 (54 & 55 *Vict. c.* 39)—*Legacy—Transfer of stock by executor to legatee—Conveyance or transfer on sale*—Ad valorem *duty.*

Where a legatee under a will agrees with the executor to take payment, or part payment, of the legacy in stock or securities of the testator, the transfer deed executed in pursuance of the agreement is a "conveyance or transfer on sale," within the meaning of the Stamp Act, 1891, and is chargeable with *ad valorem* duty, to be assessed in accordance with the provisions of that Act.

CASE STATED by the Commissioners of Inland Revenue pursuant to the 13th section of the Stamp Act, 1891, for the opinion of the Court.

(1) Before PALLES, C.B., and ANDREWS and JOHNSON, JJ.

K. B. Div. 1904.

DAWSON v. COMMRS. OF IN. REVENUE

The case stated was as follows:—

1. On the 8th day of December, 1903, an instrument, a copy of which is annexed to, and forms part of this case, was presented on behalf of Francis Staunton Massy Dawson (hereinafter called the appellant) by Messrs. Baker & Ringwood, his solicitors, to the Commissioners of Inland Revenue, under the provisions of the 12th section of "The Stamp Act, 1891" (54 & 55 Vict. c. 39), for their opinion as to the stamp duty with which the instrument was chargeable.

2. The instrument is dated the 5th day of December, 1903, and purports to be a transfer of £2000 of the Perpetual Consolidated 4 per cent. Debenture Stock of the Canadian Pacific Railway by the appellant, as executor of Richard Hawkins Beauchamp, deceased, to Agnes Massy Dawson, spinster.

3. The said Richard Hawkins Beauchamp duly made and executed his last will and testament, dated the 19th day of August, 1902, and thereby bequeathed £7000 to each of the children of the appellant.

4. Agnes Massy Dawson, the transferee in the said deed, is one of the children of the appellant, and as such is entitled to the sum of £7000 under the said bequest.

5. The said Richard Hawkins Beauchamp died on the 22nd day of May, 1903, without having altered or revoked his said will, and Probate thereof was granted to the appellant, the sole executor therein named, on the 17th day of August, 1903.

6. Prior to the said 5th day of December, 1903, an agreement had been entered into between the appellant and the said Agnes Massy Dawson, by which the said Agnes Massy Dawson agreed to accept the said debenture stock, which formed part of the testator's estate, in satisfaction of £2220, part of the said legacy of £7000, and the instrument in question was executed in pursuance of such agreement and for the purpose of carrying out the same.

7. The gross value of the personal property of the said Richard Hawkins Beauchamp, as appears by the affidavit leading to Probate, delivered to the Commissioners of Inland Revenue, by the appellant, was £423,926 15*s.* 10*d.*, and the net value was £423,165 16*s.* 2*d.*

8. The appellant contended that the instrument was a transfer by a trustee to a beneficiary, which conferred no benefit on the trustee or the estate he administered; and that it was chargeable with the fixed duty of 10*s.* only, and not with *ad valorem* duty as a "conveyance on transfer or sale."

9. The Commissioners were of opinion that the transaction effected by the instrument was a sale of a marketable security chargeable with duty under the head "transfer, assignment, disposition or assignation of a marketable security of any description, upon a sale thereof" in the schedule to the Stamp Act, 1891, by reference to the scale of duty under the head "conveyance or transfer on sale" in the said schedule, and they accordingly assessed the said instrument with *ad valorem* duty of £11 5*s.*, being at the rate of 5*s.* for every £50 upon the sum of £2220, the portion of the said legacy stated to have been discharged by the said transfer.

10. When the instrument was presented to the Commissioners for their opinion, it bore a 10*s.* stamp; and on being informed of their decision, the appellant thereupon paid the further duty of £10 15*s.* to the Commissioners, and the instrument was stamped accordingly, and also with the particular stamp referred to in section 12 (4) of the Stamp Act, 1891, denoting that it was duly stamped.

11. The appellant being dissatisfied with the assessment has, in pursuance of section 13 of the said Act, required the Commissioners to state and sign a case setting forth the questions on which their opinion is required, and the Commissioners do hereby state and sign this case accordingly.

The questions for the opinion of the Court are:—

1. Whether the instrument is chargeable with the duty in accordance with the assessment of the Commissioners?
2. If not, with what duty is it chargeable?

Given under the hands of the Commissioners of Inland Revenue, the 4th day of March, 1904.

H. W. PRIMROSE.
L. N. GUILLEMARD.

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The transfer deed was as follows:—

"I, Francis Staunton Massy Dawson, of No. 7, Herbert-street, Dublin, executor of Richard Hawkins Beauchamp, deceased, in part discharge of a legacy of £7000 under the will of deceased, payable by me, as his executor, to Agnes Massy Dawson, of No. 46, Merrion-square, Dublin, spinster, hereinafter called the said transferee, and in consideration of my release as executor by her, do hereby assign and transfer to the said transferee £2000 of the Perpetual Consolidated Four per cent. Debenture Stock of and in the undertaking called the Canadian Pacific Railway Company, to hold unto the said transferee, her executors, administrators, and assigns, subject to the several conditions on which I held the same immediately before the execution hereof. And I, the said transferee, do hereby agree to accept and take the said stock subject to the conditions aforesaid. As witness our hands and seals," &c.

Poole, for the appellant:—

This was not a "conveyance on sale." It was an appropriation: *Saltoun* v. *the Advocate-General* (1). [He referred to Hardcastle on Statutes, at page 423: *Income Tax Commissioners* v. *Pemsell* (2); Highmore's Stamp Laws, at page 131: *In re Lepine* (3); *In re Beverley* (4); and *J. & P. Coats* v. *The Commissioners of Inland Revenue* (5).]

Coll (with him *Henry*, *K.C.*), for the respondents:—

The substance of the transaction was really a sale. The transferee put herself in the same position as if she were a specific legatee, and, the moment that agreement was made for consideration in money or money's worth, it became a sale within the meaning of the Act. The arrangement is as much a buying of the stock as is the case of a person who being owed a sum of money by his broker takes from the broker an equivalent in stock in discharge of the debt. It is only a matter of book-keeping, but it is a sale. [He referred to the following additional cases:—*The Great Western Railway Company* v. *The Commissioners of Inland Revenue* (6) and *John Fisher* v. *The Commissioners of Inland Revenue* (7). *Lepine's Case* (3) is almost a point-blank decision on the question.]

Poole, in reply.

(1) 3 MacQ. 659.
(2) [1891] A. C. 531.
(3) [1892] 1 Ch. 210.
(4) [1901] 1 Ch. 681.
(5) [1897] 1 Q. B. 778.
(6) [1894] 1 Q. B. 507.
(7) *Ibid.* 516.

PALLES, C.B. :—

This case is unarguable. We are to determine whether the document in question is a "transfer on a sale." Immediately before its execution the property in this Canadian Pacific Stock was in the executor, and not in Miss Dawson. Upon the registration of the instrument the property in the stock vested in Miss Dawson—that is, the transaction was one in which the property passed from one person to another. A sum of money was payable by the transferor to the transferee, and the transferee agreed to accept that stock in lieu of £2220, parcel of the money due. The legal effect of the transaction was identically the same as if money were not due by the executor to Miss Dawson, and if she handed over £2220 to him as the price of this stock. The judgment of Lindley, L.J., in *Foster* v. *The Commissioners of Inland Revenue* (1), which is no more than a repetition of many previous decisions, disposes of the whole case. He says, "Then, what have we got? To sum it up shortly, it is a conveyance of property from one person to another for money . . . What is that, except a 'conveyance on sale'? What else can you call it? It is certainly not a gift; it is not an exchange; it is not partition; it is not a mortgage. I do not know what it is, unless it is a conveyance on sale. I do not know what is necessary to constitute a sale, except a transfer of property from one person to another for money, or, for the purpose of the Stamp Act, for stock or marketable securities." In the same way, I do not know what is a sale unless this answers that description, and this document is the "transfer" on that "sale."

Under this Act we are obliged to state the duty in our order. We, therefore, answer the first question in the affirmative; and we shall state in our order that the stamp duty is £11 5*s*.

ANDREWS and JOHNSON, JJ., concurred.

Solicitors for the appellant: *Baker & Ringwood.*

Solicitor for the respondents: *The Solicitor for the Inland Revenue.*

J. L.

(1) [1894] 1 Q. B. 516, at p. 528.

K. B. Div. 1903.

June 8, 17.

Appeal.

Dec. 3, 4. 1904.

Feb. 16.

THE KING (BLACKBURN) *v.* THE CHAIRMAN AND JUSTICES OF COUNTY DOWN (1).

Licensing law—Licensing (Ireland) Act, 1902 (2 *Edw.* 7, *c.* 18)—*Transfer—New license—Surrender of lease—Premises pulled down and rebuilt—Existence of license—Licensed premises.*

A., the tenant of a licensed house, surrendered the house to the landlord in November, 1901. A. had carried on the business of a publican on the premises up to the time of surrender, and had obtained on the 10th October, 1901, the usual Excise license for the year expiring 10th October, 1902. After the surrender the existing house was pulled down, and a new house built which, with the curtilage attached thereto, covered the site of the old premises and also a considerable additional area. In September, 1902, A. endorsed the license, and handed it over to B., who was in possession of the new premises. B. applied at the Annual Licensing Quarter Sessions in October, 1902, for a transfer of A.'s license, and also for a new license. Both applications were refused, the County Court Judge having ruled that there was not at the date of the passing of the Act of 1902 any license in existence in respect of the premises or any portion thereof, and that the premises were not attached to or adjoining premises licensed at the passing of the Act. On an application by B. for writs of *certiorari* and mandamus:—

Held, by the King's Bench Division, that B. was not entitled to a transfer of A.'s license, and that, as the case did not come within any of the exceptions in the Licensing (Ireland) Act, 1902, there was no jurisdiction to grant a new license.

Held, per Palles, C.B., and Barton, J., that the license granted to A. was still in force at the date of the passing of the Licensing (Ireland) Act, 1902 (31st July, 1902); but *held*, that the words "the said licensed premises" in the proviso to section 6 of the Act meant the formerly licensed premises, and that, as, in the present case, the new buildings in which it was intended that the business should be carried on did not include any substantial part of the formerly licensed premises, the case did not come within section 6.

Held, per Wright, J., that the license granted to A. was not in force at the date of the passing of the Act, and that on this further ground the case was excluded from section 6; and that the case was not within section 3, inasmuch as that section applies only where the expiration of the lease, by reason

(1) In the King's Bench Division, before Palles, C.B., and Barton and Wright, JJ.

of which the license is extinguished or surrendered, takes place after the passing of the Act.

On appeal:—

Held, per Lord Ashbourne, C., and FitzGibbon, L.J., that the ruling of the County Court Judge was wrong, inasmuch as there was, as matter of law, a license in existence in respect of the premises at the date of the passing of the Act, and that the premises were, within the meaning of section 6 of the Act, attached to or adjoining premises licensed at the date of the passing of the Act, and that therefore the mandamus should go.

Held, per Walker and Holmes, L.JJ., that the premises were not licensed at the date of the passing of the Act, and that they were not attached to or adjoining premises licensed for the sale of intoxicating liquors at the date of the passing of the Act, within the meaning of section 6 of the Act, and that therefore the decision appealed from was correct.

The Court of Appeal, being equally divided, made no order on the appeal, and accordingly the order of the King's Bench Division stood affirmed.

CERTIORARI AND MANDAMUS.

The following statement of the facts is taken from the judgment of Wright, J.:—

"William John Askin was tenant to Lord Dunleath of a licensed house in Ballywalter, county Down, under a lease for lives and years, the term and interest in which expired in June, 1901, after which time Askin remained on in possession until November, 1901, when he surrendered and gave up possession to the landlord, who paid him a sum of £200. Askin carried on the trade and business of a licensed publican in the house until he left in November, 1901, and prior to that he in October, 1901, paid the license duty and obtained the usual Inland Revenue license, dated 10th October, 1901, for the year which would expire on the 10th October, 1902. He took a house adjoining, and some time in the following year applied for a license for this house, which application, being for a new license, was refused.

"Shortly after the surrender to the landlord the old house was pulled down, and the erection of a new house was commenced; the building of this house would appear to have been going on from the early months of 1902 down to September of that year, when it would appear to have been finished; and while it covers the site of the old licensed premises, it is certain that it covers also a very considerable additional area. It occupies a frontage to the street of 93½ feet, being 35 feet more frontage than that of the old

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house; it was erected at a cost of about £3000, and is altogether a larger and costlier house than the old one which it has replaced. The new house is called 'The Dunleath Arms.' It could not for a moment be contended, nor was it contended, that the new premises are substantially the same as the old premises. It is plain that they are essentially different, *i.e.* not merely that there are structural differences, but also large additions made to the old premises (1).

"It is stated that Lord Dunleath has agreed to grant a lease to the Ulster Public House Trust Company, Limited, a Company incorporated in July, 1901, having for its object, amongst others, the acquiring of licensed premises and the reforming of the arrangement and management of them. The Company appointed Mr. Joseph Blackburn manager of these new premises, and he got possession from the landlord. On the 18th September, 1902, Askin, the former tenant, by endorsement on the license purported to assign and transfer his interest therein to Blackburn; and at the Annual Licensing Quarter Sessions held in Newtownards on the 25th October, 1902, he (Blackburn) applied to the Chairman and Justices, first, for a transfer of Askin's license, and, secondly, for a new license for the Dunleath Arms. These applications were opposed by two parishioners, and were refused; the first, on the ground that this was not properly a transfer or the subject of an application for a transfer; and the second, on the ground that the application did not come within any of the exceptions in the Licensing (Ireland) Act, 1902. A fresh application for a new license was made at the Quarter Sessions held at Newtownards on the 20th January, 1903, was opposed as before, and was refused by the County Court Judge, who ruled, as appears from the affidavit of Mr. W. B. Galway, that it did not come within section 6 of the said Act, on two grounds—(1) that there was not at the date of the passing of that Act any license in existence in respect of the said premises or any portion thereof; and (2) that

(1) The frontage of the new premises was moved back some distance from the street, so that the front wall occupied the site of the back wall of the old premises, a bow window in the front wall of the new premises projecting a few feet over the ground occupied by the old premises. The rest of the old site, separated by a wall from the street, was within the curtilage of the Dunleath Arms, and contained the approach to the hall-door.—[REP.]

the new premises were not, within section 6, attached to or adjoining said last-mentioned premises. On the 7th May counsel for Blackburn obtained from this Court a conditional order for a writ of *certiorari* to bring up the three orders of refusal (the two of 25th October, 1902, and one of 20th January, 1903), and for a mandamus, against which cause has been shown by counsel for the same objectors."

W. Martin Magrath (with him *J. O'Connor*), for the prosecutor:

The interest both in the premises and the license was vested in the prosecutor, and he was therefore entitled to a transfer of the license. At all events, if he was not entitled to a transfer, the magistrates had jurisdiction under section 6 of the Licensing (Ireland) Act, 1902, to grant a new license. The premises for which such new license is sought are attached to or adjoining premises licensed at the date of the passing of the Act. Licensed premises are defined by section 77 of the Licensing Act, 1872 (a definition incorporated by section 8 of the Act of 1902) as meaning premises in respect of which a license as defined has been granted and is in force. License is defined by section 37 of the Licensing (Ireland) Act, 1874, as meaning "any license for sale of any intoxicating liquor granted by an officer of Excise in Ireland upon production . . . of a certificate . . . of Justices . . . " The license in the present case was granted in October, 1901, and enured up to October, 1902. It was, therefore, in force on the 31st July, 1902, the date of the passing of the Licensing Act of 1902. Assuming, however, that the license has become extinguished by reason of the surrender of the premises to Lord Dunleath, then the case comes within section 3 of the Act of 1902. [He referred to *R.* (*Callaghan*) v. *The Justices of Donegal* (1); *R.* v. *Raffles* (2); *R.* (*Kennedy*) v. *The Justices of Antrim* (3).]

Michael J. Dunn, for W. C. Carmichael, an objector below:—

The new premises are not substantially the same as the old, and therefore the prosecutor was not entitled to a transfer. He was not entitled to a new license under sect. 3 of the Licensing

(1) [1898] 2 I. R. 652. (2) 1 Q. B. D. 207. (3) [1903] 2 I. R. 671.

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(Ireland) Act, 1902; I submit that that section does not apply to a license which was extinguished or surrendered before the passing of the Act. The words are, "*is* extinguished or surrendered," not "*has been* extinguished or surrendered." Nor does the case come within sect. 6, which obviously deals with the granting of a new license as accessory to existing licensed premises. Here there was no license existing in respect of any portion of the premises at the date of the passing of the Act of 1902. The interest in the premises, and the interest in the license, became severed on the surrender to Lord Dunleath in November, 1901, and were never again united in the same person. The license, therefore, ceased to be in force. A license can only be legally transferred by being endorsed by the Justices pursuant to 18 & 19 Vict. c. 114, and this was never done in the present case. Lord Dunleath, or his nominee, may have had an equitable right to a transfer of the license, but this is not sufficient. [He referred to *Brennan* v. *Dorney* (1); *R.* (*Murphy*) v. *The Justices of Cork* (2).]

Edward Cuming, for W. J. Warnock, an objector below.

James O'Connor, in reply:—

The assignment of the licensed premises carries with it the goodwill, and the right to call for a transfer of the license. In the present case Lord Dunleath, or his nominee, could have applied for and could have obtained at any time during the licensing year up to October, 1902, an *ad interim* transfer from the Justices. This shows that the license granted to Askin continued in existence. The fact that the old premises were pulled down, and new premises built, is immaterial: the license applies to the site, and not merely to the buildings. Suppose the old premises had been burned down, could it be contended that the license was gone?

Cur. adv. vult.

June 17.

PALLES, C.B.:—

There are two questions for decision here.

First, whether the premises which were included in the license of October, 1901, were licensed on the 1st January, 1902, or at

(1) 21 L. R. Ir. 353. (4) [1895] 2 I. R. 104.

any time between that date and the 31st July, 1902, the date of the passing of the Licensing (Ireland) Act, 1902.

Secondly, whether there is any evidence that the new license sought could render the portion of the licensed premises included within the new structure more suitable for the business carried on in the formerly licensed premises.

I am of opinion that the premises included in the old license were licensed on the 1st January, 1902, and thenceforth until the following October. The meaning of "premises which are now licensed," in sect. 2 (1) of the Act of 1902, must be ascertained from the definition of "licensed premises" in the Licensing Act, 1872 (35 & 36 Vict. c. 94, s. 77), *i.e.* "licensed premises shall mean premises in respect of which a license, as defined, has been granted, and *is in force*."

Was the license granted in October, 1901, in force in July, 1902? It is said that it was not, for two reasons. First, because the premises had been taken down for the purpose of rebuilding. Secondly, because the interest of William John Askin, in the premises and the license, had been previously transferred.

As to the first ground, I am of opinion that a license continues in force although the licensed premises have been taken down with the view to being rebuilt, provided the trade of a publican has been, as it has been here, *bonâ fide* carried on during a substantial part of the year covered by the license.

As to the second ground, the effect upon the license of the transfer of the premises and license appears to me to be made clear both by 6 Geo. 4, c. 81, sect. 21, and 18 & 19 Vict. c. 114, sect. 1. Under the first of these sections, upon the removal of the licensed trader from the licensed premises, trade carried on by his assignee during the residue of the year covered by the license is so carried on, to use the words of the section, "*by virtue of such license*," *i.e.* the original license. The first section of the latter Act (18 & 19 Vict. c. 114) enacts:—"Upon the death of any person duly licensed to carry on the business of a licensed victualler, . . . or upon the removal of any such person from the house or premises at which he is authorized by any such license to carry on such business as aforesaid, or the sale or assignment of his

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interest therein by operation of law or otherwise, it shall be lawful for the Justices . . . to transfer, by endorsement thereon, any and every such license as aforesaid *then in force*, to any person not disqualified by law."

This section shows that the license is deemed to be in force after the transfer of the interest. I think the true meaning of the words "is in force," in sect. 77 of the Act of 1872, is that it must not have been annulled, forfeited, or otherwise specifically rendered void. Were there no other question for decision, I should, therefore, be of opinion that the *certiorari* should go.

I am, however, further of opinion that, upon the admitted facts of the case, and without drawing any inference of fact, the case is not within sect. 6 of the Act of 1902. Here the new building in which it is intended that the business shall be carried on does not include any substantial part of the former licensed premises. The part common to both sets of premises is infinitesimal. The proviso of sect. 6 is that any such new license "shall only be granted in order to render *the said licensed premises*," which mean the premises formerly licensed, "more suitable for the business carried on therein." "Therein" means in the formerly licensed premises. Here it is not intended to carry on the business in the formerly licensed premises, or in any substantial part of them. The intention is to carry it on in premises which, with an infinitesimal exception, are wholly different.

The case, therefore, was not within the exception in sect. 6 of the Act of 1902, and the Quarter Sessions had no jurisdiction to grant the application. *Certiorari* cannot be granted.

BARTON, J.:—

I concur in the judgment of the Lord Chief Baron, and for the reasons given in that judgment.

WRIGHT, J.:—

The facts of this case, which are not controverted and are set out in the affidavits used on the motion, may be shortly stated as follows:—[His Lordship stated the facts as set out above, pages 75–77.]

On the hearing several questions, some of considerable difficulty, arising on the previous Irish Licensing Acts and on the recent Act of 1902, have been argued. It was not very strenuously contended before us that the applicant could maintain his application for a transfer to the present house, of Askin's license for the old house. It could not be contended that the new house, "The Dunleath Arms," was substantially the same building, or consisted substantially of the same premises, as the old house, to adopt the test applied in *The Queen* (*Callaghan*) v. *The Justices of Donegal* (1), and the English case of *R.* v. *Raffles* (2). It was admitted that in extent of frontage, size, and character of buildings, the new house was substantially and essentially a different house, and, apart altogether from all considerations arising from the provisions of the Licensing Act of 1902, it is quite plain that under the circumstances no application could have been entertained except one for a new license. This being so, the question is—Do the facts proved bring this case within any one of the exceptions in that Act? It was said that it came within either sect. 3 or sect. 6. As to the first contention, that it came under sect. 3, that is at once disposed of when it is borne in mind that the expiration of the lease or tenancy here was in November, 1901—a date anterior to the passing of the Act; and it is plain, from the language of the section, that it deals only with the surrender or extinguishing of a license by the expiration of a lease after the passing of the Act, and not with leases expiring before that date, and causing a license to be surrendered or extinguished. But the main contention on behalf of the prosecutor was that the case was within sect. 6 of the Act of 1902, in this sense, that the present house consisted partly of buildings on the site of, and replacing, the old house which had been demolished, and partly of new buildings; and that so far as the application for the new license was concerned with the first part of the house, those premises were licensed at the date of the passing of the Act, and that a license for the added part of the premises was required for the more convenient carrying on of the business in the old licensed premises.

There is no doubt that a license to be exercised in respect of

(1) [1898] 2 I. R. 652. (2) 1 Q. B. D. 207.

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the old house had been issued to Askin on the 10th of October, 1901, for a year from that date, which would cover the period in question; and we were referred to the definition of "licensed premises" in the Licensing (Ireland) Act of 1872, which, by sect. 77, are declared to mean "premises in respect of which a license as defined by this section has been granted and is in force"; and this definition must, in my opinion, be read into the Act of 1902, by force of sect. 8 of that Act.

Was this license in force? Nothing was sold under it, and no trading carried on from the end of November, or first week of December, 1901. This, it is said, is not decisive, and I admit it is not; many circumstances may, as was pointed out by the two learned Judges, Holmes and Gibson, JJ., who delivered the judgment in *Lambe's Case* (1), account for, and excuse, non-trading for part of a year; but here it is not, as it appears to me, merely the fact that no trade was carried on, but there was no one who could carry it on, no one who took proper legal steps to get authority to trade. When Askin left, and possession of the house was given to Lord Dunleath, it may be, and I assume it to be, that his (the landlord's) nominee could have got a transfer of the license by endorsement from the excise authorities (under sect. 21 of the 6 Geo. 4, c. 81), and could, by taking the proper steps, have obtained an interim transfer from the Licensing Justices at Petty Sessions, authorising him to trade under the license in the house until the next Quarter Sessions (18 & 19 Vict. c. 114, sect. 1). But this was never done; the house was levelled to the ground; a new and entirely different house was during the year 1902 in process of erection; and it is not merely that during no time in the year 1902 was any trade carried on in the house—there was in fact no house in existence according to paragraph 4, of Mr. M'Kee's affidavit—but further, there was no person who could have legally carried on trade. No interim transfer was ever obtained or applied for. It appears to me that immediately after the previous tenant had left—which was in November or December, 1901—the house was pulled down; it was replaced by an entirely new and essentially different structure; no attempt was made to

(1) [1897] 2 I. R. 57.

keep alive the old license; no step was taken to make it a valid and operative license under which the trade of a publican could be carried on. I cannot find that there ever was centred in one and the same person the possession of the licensed premises and the title to the old license, until the 18th of September, 1902, when Askin endorsed it to the prosecutor, and in the meantime the Act of 1902 had passed. There never was during the period from the 1st of January to the 25th of July, 1902, any person who could under the license have sold in the house if the old house had remained standing. I, therefore, think these premises, *i.e.* the old house and premises, were not licensed at the date of the passing of the Act in the sense that the license was then in force, and on this ground I hold that the ruling of the County Court Judge was in law correct. This is, of course, sufficient to dispose of the case.

As to the second ground, I wish only to say that I fail to see how, with proper regard for the meaning of the language used in the section, it can be said that the added premises are, on the facts proved here, an adjunct to the old premises, and that a license is asked for the new premises in order to make the trading in the old more conveniently carried on. On this ground also I am of opinion that the application was untenable.

J. G. T.

Appeal. Dec. 3, 4. 1904. Feb. 16.

Blackburn appealed to the Court of Appeal (Lord Ashbourne, C., FitzGibbon, Walker, and Holmes, L.JJ.).

W. Martin Magrath and *J. O'Connor*, for the appellant.

Michael J. Dunn, for Carmichael.

Cuming and *Williamson*, for Warnock.

The arguments were the same as in the Court below.

Cur. adv. vult.

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Feb. 16.

LORD ASHBOURNE, C.:—

This is an appeal from the King's Bench Division, and involves the consideration of the construction of the Licensing Act of 1902.

The facts of this case, as to which there is little, if any, dispute, are shortly as follows:—

Up to November, 1901, one Askin was carrying on the business of a publican in a house which he held under a lease from Lord Dunleath. The house was duly licensed, and Askin renewed the license in 1901. In November of the same year, in consideration of a payment of £200, he surrendered the premises to Lord Dunleath, and it must, I think, be taken that the transaction involved a transfer of his interest in the license. Lord Dunleath proceeded to pull down the house and rebuild it for the Ulster Public House Trust Company—a Company formed to improve and reform the arrangement of the public houses they might acquire.

The new building, which was completed in or about September, 1902, was much larger than the original house, and on a somewhat altered and wider site, the curtilage of the old premises being comprised in the new curtilage, though only a small part of the site covered by the old building was actually included in the new house; and it is urged by the respondent that the new premises are so enlarged and so improved that in no fair sense can they be regarded as identical with the old premises or their site, or as attached to or adjoining the same.

In the meantime, on the 31st July, 1902, the Licensing (Ireland) Act, 1902, prohibiting the granting of any new license in Ireland, save in specially excepted cases, had become law. It therefore was impossible to obtain a license for the new house unless it came within one of these exceptions; and it is contended on behalf of the applicant that it comes within sect. 6, which runs as follows:—

> "Nothing in this Act shall operate to prevent the granting of new licenses, where the licensing authority thinks fit, to premises attached to or adjoining premises licensed for the sale of intoxicating liquors at the date of the passing of this Act. Provided always that such new license as last hereinbefore mentioned shall only be granted in order to render the said licensed premises more suitable for the business carried on therein."

At the last Annual Licensing Sessions the learned County Court Judge ruled that the case did not come within this provision, and that, therefore, the license could not be granted under the Act. He held as a matter of law, (1) that there was not any license in existence in respect of the premises; and (2) that the new premises called the "Dunleath Arms" were not attached to or adjoining the premises at the date of the passing of the Act. The Justices were not, therefore, allowed to hear and determine any question of fact in reference to the premises, and the applicant seeks for a mandamus directed to the Justices at Quarter Sessions to hear and determine the application for a new license for these premises.

It is contended on behalf of the respondents that the present case is not within the section on the two grounds referred to: (1) that there were at the date of the passing of the Act no "licensed premises" to which the new house could be attached or adjoining; and (2) that the grant of a license would not fulfil the proviso at the end of the section.

On the first point, for the reasons so fully stated in the judgment of the Lord Chief Baron, I am of opinion that the respondents' contention cannot be sustained. Neither the taking down of the premises with a view to the rebuilding and to continuing the trade nor the transfer of the interest in the license can on the authorities prevent the license from continuing in force. As regards the transfer, the matter appears to be made clear, as pointed out by the Lord Chief Baron, by sect. 21 of 6 Geo. 4, c. 81, and sect. 1 of 18 & 19 Vict. c. 114.

The second point raises a question of much more difficulty. It is argued that a grant of a license to the new house could not "render the said licensed premises," which, it is urged, must mean the old house, "more suitable for the business carried on therein, as the old house ceased to exist. In other words, it is contended that the new "Dunleath Arms" cannot be regarded as attached to or adjoining Askin's old publichouse. It is, however, necessary to note that the whole of the old site is included in the new lease, and that the front wall of the new house stands where the old back wall was situated, and the rest of the old site would appear to be an essential part of the approach to the Dunleath Arms, and is within its curtilage. I do not say

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Lord Ashbourne, C.

that the case is entirely free from doubt; but, on the whole, I am of opinion that to give effect to the contention of the respondents, would be taking too narrow a view of the construction of the section. The intention was obviously to permit the enlargement and improvement of licensed premises. Any enlargement must necessarily involve some, and possibly very considerable, structural alteration. I see no reason for placing undue limits on the structural alteration to be allowed. Take the case of a man who wishes to add an adjoining house to one already licensed. Can it be said that if he merely makes an opening in the separating wall he is within the section; while if he rebuilds the whole premises, he is without it? And if he rebuilds, is the new building bound to cover the exact site of the old licensed premises?

Such a construction would, I think, be narrow and illiberal, and would tend to defeat the object of the section.

I, therefore, must hold that the present case, where there is an admittedly larger and more suitable building covering a part, though it may be only a moderate part, of the site of the old licensed premises, comes within the section, and that the mandamus asked for should be granted.

The Court being, as I understand, equally divided makes no order on the appeal; and, therefore, the order of the King's Bench Division stands affirmed.

FITZ GIBBON, L.J.:—

The Applicant, as Manager of "The Ulster Public Houses Trust Company, Limited," seeks for a *Mandamus* to the Justices in Quarter Sessions, to hear and determine his application for a new license for "The Dunleath Arms" at Ballywalter, which was refused at the last Annual Licensing Sessions. The County Court Judge ruled, as matter of law, that the application did not come within the Licensing (Ireland) Act, 1902, sect. 6, and, therefore, that sect. 2 of the same Act forbade the granting of it. He so ruled on two grounds:—

(1) That there was not at the date of the passing of the Act any License in existence in respect of the Premises, or any portion thereof.

(2) That the Premises were not attached to or adjoining Premises licensed at the date of the passing of the Act.

The Justices were not permitted to consider, and therefore did not hear and determine, any question of fact which the applicant was entitled to have submitted to them; if there was any evidence to sustain any finding in fact, or any exercise of judgment or discretion by the Justices, which would have justified them in granting the application, we cannot exercise their jurisdiction for them, but we must grant the *Mandamus* to them to hear and determine the case for themselves.

The Saving Clause and Proviso of section 6 are in these terms:—

> "Nothing in this Act shall operate to prevent the granting of new Licenses, where the Licensing Authority thinks fit, to Premises attached to or adjoining Premises licensed for the sale of intoxicating liquors at the date of the passing of this Act; Provided always that such new License as last hereinbefore mentioned shall only be granted in order to render the said Licensed Premises more suitable for the business carried on therein."

To bring himself within this section, it appears clear to me that the applicant had to give *prima facie* evidence of two facts only, viz.:—

> (1) That the Premises for which the application was made were attached to or adjoining Premises which were licensed for the sale of intoxicating liquors on July 31, 1902.
>
> (2) That, if the License were granted, the Premises would be more suitable for the business carried on therein than they had been during the currency of the previous License.

The facts, upon the first question, are not in dispute.

Until June, 1901, William John Askin, a Licensed Publican, held licensed Premises on part of the site of "The Dunleath Arms," fronting the Main Street of Ballywalter, under a lease dated September 13th, 1836. That lease expired in or about June, 1901, and Askin remained on as weekly tenant of the Premises up to the end of November, 1901, when he surrendered them to the Landlord, Lord Dunleath, in consideration of a payment of £200. He carried on the trade of a Licensed Publican upon the demised Premises until the surrender.

At the Annual Licensing Petty Sessions in September, 1901,

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he duly obtained a Renewal Certificate, and on October, 10, 1901, he paid the License Duty, and obtained the usual Inland Revenue License, for the year ending with the Annual Licensing Sessions held in October, 1902.

That License was in full force when he surrendered the premises to Lord Dunleath, and the £200 was paid to him for the surrender of all his interest and goodwill, in respect as well of the Tenancy as of the License. By the surrender Lord Dunleath became entitled, as Assignee, to obtain an "Interim Transfer" of the License at Petty Sessions, under 18 & 19 Vict. c. 114, section 1.

This Court has recently decided in *Brown* v. *Watson* (1) that it is not obligatory upon an Assignee, who does not himself desire to carry on the business, to obtain such an Interim Transfer, pending the assignment of the Premises by him to another person; and that a person subsequently becoming the Assignee of the Premises and of the License is entitled to apply for a new License in his own name, which, when obtained, will entitle him to carry on the business, notwithstanding that the Mesne Assignee had not obtained an Interim Transfer.

The application, in this case, must have been for a new License, and not for a Renewal or Transfer, not only because the buildings were new, but because they had been assigned to a new Occupier.

The Chief Baron has held, in favour of the Applicant, that the Premises included in Askin's License continued to be "Licensed Premises" within the meaning of the Act of 1902, and within the definition in the Act of 1872, sect. 77, after the surrender, and I cannot doubt the soundness of that decision; it is obvious that no Public House could be rebuilt without losing its License, if it were wrong.

The ground of refusing the application was the mode in which the Premises were dealt with after the surrender. As to that the facts are as follows:—

The Company represented by the Applicant is a semi-philanthropic Body duly registered as a Limited Liability Company.

(1) [1904] 2 I. R. 218.

Among the objects stated in its Memorandum of Association is—

> "To acquire existing Licenses relating to Licensed Premises, and to reform the arrangement and management of Licensed Premises in such a way that they shall become respectable and well-conducted Houses of Refreshment, and places where good and non-intoxicating drinks shall be supplied to Customers as readily as Intoxicants."

The object of Lord Dunleath in taking the surrender from Askin, and in paying him £200 for his goodwill, was to grant a Lease at a moderate rent to this Company, of Askin's Premises with some additional ground, in order that the Company might erect thereon a new Refreshment House, for which they and he intended that a License should be obtained as soon as possible.

Immediately after the surrender, Askin's house was completely pulled down, for the purpose of building "The Dunleath Arms," and the building was at once begun. An application for an Interim Transfer of Askin's License was made, but it was refused upon the ground that the business could not be carried on during the re-building, and that the proper course was to apply for a new License for "The Dunleath Arms" when completed. This course appears to be in accordance with *Reg.* (*Callaghan*) v. *Donegal Justices* (1), and *R.* v. *Raffles* (2); and it has also been held in *Lambe's Case* (3), followed by this Court in *Brown* v. *Watson* (4), that the right to apply for a new License at the Annual Licensing Sessions is not lost by an interruption of the business even for a considerable period, provided such interruption is consistent, under the circumstances of the case, with the *bona fide* intention of continuing the License, and of resuming the business, as soon as reasonably may be. In the words of Holmes, L.J., in *Lambe's Case* (1), quoted with approval here in *Brown* v. *Watson* (4):—

> "In all business there may be cessations and interruptions; *re-building or repairing the premises*, death, illness, want of means, many other causes, may keep up the shutters and close the door for a time, *but the trade is not abandoned.*"

(1) [1898] 2 I. R. 652.
(2) 1 Q. B. D. 207.
(3) [1897] 2 I. R. 57.
(4) [1904] 2 I. R. 218.

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The only interruption here was for the purpose of enlarging, improving, and re-building the Premises, with the object of resuming the licensed business as soon as possible.

The same cases lay down that it is for the Justices to determine, upon reasonable consideration of all the circumstances, upon the application for a Certificate for the new Premises, whether the interruption is consistent with the honest intention, and the substantial result, of carrying on the business in a peaceable and orderly manner. I can hardly conceive a case more meritorious than the present one, upon this point.

The Lord of the Manor, in agreeing to give a Lease to the Company, and in paying his £200 to Askin, acted with the object of providing more suitable Licensed Premises for Ballywalter, which is at the entrance to his own Demesne and Residence, is a Town of over 600 inhabitants, and is a sea-side resort for people likely to appreciate the good accommodation which "The Dunleath Arms" was designed to afford.

The Company expended £3000 in erecting "The Dunleath Arms," but, unfortunately, the Act of 1902 passed before the building was complete. It is now contended that they have so much altered and improved Askin's Licensed premises, as to exclude themselves from the saving Section 6. It is said that there is not even any evidence sufficient to be submitted to the Justices, either that the new Premises are "attached to or adjoining" Askin's Premises, or that the granting of the new License is capable of rendering those Premises "more suitable for the business carried on therein."

The building has been moved back from the street, so that the new front wall occupies the site of the old back wall. But the whole site of Askin's House is in the possession of the Company, and is included in their Lease, and the whole thickness of the front wall, with the whole of a projection which forms part of the principal public room of "The Dunleath Arms," actually stand upon the site of Askin's Building; the rest of that site has been cleared and levelled, and has been fenced by a wall and railing which separate it from the street, and stand on the site of Askin's front wall, enclosing part of the curtilage, and containing the approach to the hall door of "The Dunleath Arms."

Under such circumstances, I hold it to be contrary to the ordinary meaning of words, as well as mischievous and unjust in effect, to say that the new Premises are neither "attached to" nor "adjoining" the old Premises of Askin. The whole area of Askin's Lease is included in the Company's Lease, and the new building not merely adjoins, but it *overlaps* the site of Askin's building which was pulled down.

It is further said that there is an absence of evidence, so total that the Justices cannot be allowed to consider the question, that the granting of the application "will render the said Licensed premises more suitable for the business carried on therein." This cannot mean the business carried on in the old Premises only, for "therein" must refer to the Premises for which the new License is to be granted.

At best for this objection, is it not for the Licensing Authority to consider all the circumstances of the old Premises as well as of the new, and the needs of the Place, and is it not for the Licensing Justices to say whether they "think fit" to grant the new License, considering the new Premises to be more suitable for the business of a Licensed Publican in Ballywalter than the old Premises were?

We have no jurisdiction to usurp the functions of the Justices, nor to substitute our discretion for theirs. Were I a Justice, I should decline to apply to the comparison of Askin's Public House with The Dunleath Arms, the transcendental principle of Higher Mathematics by which a magnitude which passes through Infinity changes its sign, or to hold that "The Dunleath Arms" was such an improvement upon Askin's Public House that the business intended to be "carried on therein" became transfigured into a different business from that which Askin had carried on. The business in the old Premises and in the new is the same business; it is the business of selling intoxicating liquors by retail to be consumed on the Premises in Ballywalter, and Lord Dunleath and the Company have by their expenditure rendered the Premises more suitable for that business than they were before, by substituting "The Dunleath Arms" for Askin's Public House.

I cannot put a construction upon section 6, which defeats its object, nor can I take a view of the facts which inflicts a

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heavy loss and disappointment upon Lord Dunleath and the Company, through a subtle interpretation of a Statute which retrospectively affects their rights, nor can I think that this Court is justified—on the evidence in this case—in depriving the Licensing Authority of the power of exercising its exclusive jurisdiction to consider the application of the Appellants for a new License upon its merits.

On every ground, I think that the Appeal should be allowed, and that the Mandamus should go.

WALKER, L.J.:—

I am of opinion that the Appeal should be dismissed; and that the case is not brought within any saving clause in the Licensing (Ireland) Act, 1902.

There is no dispute about the facts; but to apply the statute they must be clearly understood.

Askin was tenant to Lord Dunleath of a small publichouse in Ballywalter, under a lease which expired in June, 1901. Lord Dunleath served notice that he would require possession on the 1st November, and meantime he permitted Askin to remain on as weekly tenant. Askin gave up in pursuance of the notice, but till then he carried on the trade; but from the moment that he gave up he absolutely ceased to have any interest in the premises, which vested in Lord Dunleath, who, on the occasion of giving up, paid Askin £200 for the interest in the license, not for any interest in the premises. It appears that Askin took premises in the neighbourhood, and on the 23rd October, 1902, applied for a new license for them, which was refused. I presume his supposed claim was founded on the 3rd section of the Act of 1902. Askin, before giving up, obtained, in September, 1901, a renewal certificate at Petty Sessions; and in October, 1901, he paid the duty and obtained from the Revenue Authorities a license which, under ordinary conditions, would be operative till 10th October, 1902. Lord Dunleath pulled down the house in February, and built a new house which he called "The Dunleath Arms," partly on the old site and partly on additional ground, spending a sum of £3000 in the erection. No one then had in view the legislation of 1902,

or dangers following from it. Mr. Galway, the solicitor for the applicant, describes the new house as built "on a site which is considerably greater than, and which is partly built on, and includes the site of Askin's previously licensed premises." It has a much larger frontage, and in fact so far as I can see the back wall of the old premises (exclusive of part of site) is the only common element. It has far larger accommodation for customers, and is, in every respect—both size and appearance—a different structure from that which had supplied the wants of the village of Ballywalter. From February, 1902, there was no trading or intention to trade in the previously licensed premises, and no interim transfer was sought. Lord Dunleath arranged to lease the new premises to a Company which calls itself "The Ulster Public House Trust Company, Limited," which, if I am at liberty to draw an inference from its prospectus, has for its objects the sale of drink under the guise of promoting temperance by supplying large and more attractive public houses. Blackburn is the manager, and was named as lessee. It was not till the 18th September, 1902, that Askin, who was a stranger in title from the previous November, purported to transfer the license by endorsement to Blackburn; but no interim transfer was sought, and long before that the publichouse to which it had been attached had ceased to exist without any intention of restoring that former one.

The Annual Licensing Sessions came on, on the 25th October, 1902, and Blackburn served notices: (1) for a confirmation of the transfer from Askin; (2) for a new license under the Act of 1902 for The Dunleath Arms. The first was not seriously pressed, and the solicitor withdrew it; but, as he states, without waiving it, and pressed for the new license. Both were refused on legal grounds; but it is right to state that no valuation had then been made of the premises, which of itself constituted an objection, though the merits were gone into. On the 25th January, 1903, the application for a new license was renewed before the County Court Judge, the rating having been meantime supplied. The County Court Judge decided as matter of law that the case did not come within the 6th section, which was the one relied on by the applicant.

Coming now to the legal questions which arise, it was not

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contended before us that the premises, "The Dunleath Arms," were substantially the same as the demolished structure within the meaning of *R.* v. *Raffles* (1), and other cases. It was admitted that the application could only be for a new license. This, I think, is beyond doubt; and, therefore, if this application had come before the Quarter Sessions, before the Act of 1902, and the licensing authority had refused to grant a new license, the order of refusal could not be quashed as illegal. I do not suggest that the granting of it might not have been a fairly wise exercise of discretion. So far, therefore, as regards the application for a confirmation of the transfer of 18th September, 1902, it could not, and admittedly could not, be sustained.

The real question arises on the application for a new license under the Act of 1902, and unless it comes under that there is no legal power to grant it. Three considerations arise having regard to its provisions. In the first place, I think it cannot be said that "The Dunleath Arms" was licensed on the 31st July, 1902. It was for these premises the license was sought; the old premises had certainly been licensed on the 1st January, 1902, but from February they had ceased to exist, both in fact and substance, and I think it is impossible to say that in granting a license for "The Dunleath Arms" the Authority would be granting one for premises "now licensed or which were licensed at any time since the 1st January, 1902." The facts displace the application of section 2, even if we had not section 6 to get over. If this were not so, the application should be in the character of transferee of the old license; but it is conceded such an application could not be made, and it is admitted that a new license is all that could be asked for.

It was not argued before us that the application could be sustained under section 3, and it is plain, I think, that the words do not meet the case. Mr. Justice Wright points out that it applies to a lease expiring after the Act. It was not a case of a license being extinguished or surrendered by reason of the expiration of a lease and an application for a license for premises in the immediate vicinity. The real question is that argued at length before

(1) 1 Q. B. D. 207.

us, viz.: whether, as matter of law, the 6th section meets the facts.

The case of *Molloy* v. *Cunningham* (1) was cited, but it has no application whatever. There the licensed person traded in 4 and 5, Gregg's-lane, and he broke an entrance into the adjoining premises, 25 Sackville-street, and traded there also. He was prosecuted under the 17 & 18 Vict. c. 89, and it was decided, following *Cunningham* v. *Withers* (2), that the section on which the prosecution was founded applied only when no portion of the premises traded on was licensed, and not to a case where there was a trading in excess of it. The facts in *Molloy* v. *Cunningham* (1) would probably meet the case to which the language of section 6 would apply. [His Lordship read the section.]

I cannot hold that the transformed structure of the "Dunleath Arms" is "attached to or adjoining" premises licensed on the 31st July, 1902. There were neither premises attached or adjoining to such, nor were there premises to which they could be attached or could adjoin. "The Dunleath Arms" was wholly substituted, so that the new license was required for the whole new structure. What the section contemplates by the language used in it (which must be our sole guide) is premises with an existing license attached and a new license proposed to be granted to additional ones, which will make the old structure by reason of the addition more suitable for (in the words of the section) "the business carried on therein," *i.e.* on the premises to which the addition is made, and which addition gets for the first time a new license.

The question is not whether the "Dunleath Arms" is a more suitable public house nor whether if there was a discretion it would be reasonable to exercise it by the granting of a new license. In my opinion, there is no debatable "attachment or adjunct" within the meaning of the section, and, therefore, as matter of law, the decision of the County Court Judge and King's Bench Division was right.

(1) 11 Ir. Jur. (N. S.) 37. (2) 8 Ir. Jur. (N. S.) 392.

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HOLMES, L.J. :—

The object of the conditional order obtained in this case was to test the legality of a refusal by a Court of Quarter Sessions to grant a certificate that would entitle the relator to obtain a publican's license for premises which I shall describe presently. The ground of refusal was that on the admitted facts the Court was precluded from giving the certificate by the provisions of the Licensing (Ireland) Act, 1902; and this is the only question for consideration in this appeal. It appears that William Askin carried on a publican's business in a house situated in Ballywalter held under a lease which determined in the summer of 1901. Askin remained in occupation as a tenant of some kind until after the October Licensing Sessions; and having then received a renewal of his license, he arranged in the following month to give up the premises and to transfer the license to the landlord, Lord Dunleath, in consideration of the sum of £200. Although the transfer of the document was not actually carried out until a much later date, I assume in the interest of the relator that Lord Dunleath became owner of the house and license previous to January, 1902, and that thereupon he or his assignee became entitled, provided the house was still in existence, to take the steps prescribed by 18 & 19 Vict. c. 114, and by the Licensing Act (Ireland), 1874, section 12, to enable him to carry on business till the following October, and at the Licensing Quarter Sessions then held to obtain a certificate and license in his own name. It was not, however, the intention of Lord Dunleath in getting possession of Askin's house that the publican's business should be carried on therein for the future by anyone. His object is stated in the affidavit of Mr. Galway, filed in behalf of the relator, to have been "to erect a public house in Ballywalter of the class" mentioned in the memorandum and Articles of Association of the Ulster Public House Trust Company, Limited, "in substitution for Askin's premises," and to let on lease such public house when erected to the Company. He proceeded to carry out this project early in 1902, and the issue of this appeal depends upon what was then done, taken in connection with the Licensing (Ireland) Act, 1902, which became law on the 31st July of that year. Askin's licensed premises had a frontage on the main street

of Ballywalter; and, judging by their area as shown on the map attached to Mr. Galwey's affidavit, they constituted a modest public house, such as one might expect to find in a village of 604 inhabitants, having no market, and but one yearly fair. Lord Dunleath's first step was to level this house altogether; and no portion of it has been or is intended to be re-built. The space which it covered is now open ground; and the "Dunleath Arms," the new house erected at the cost of £3000 for the purpose of being let to the Company, stands on land behind the site of the old premises, and covers a much larger space than what was occupied by them. Its front wall rests for a certain distance on the line of the back wall of the old house; and one of its bow-windows projects for 2 or 3 feet over ground occupied by part of the former building; but it is in every respect a different place from that in which Askin carried on his business.

A picture of the "Dunleath Arms" as it now stands has been put in evidence; and it appears therefrom, as well as from the map already mentioned, that the past and the present edifices have no single point in common—that in position extent and architecture there is no resemblance between them. In this state of things, it is clear that even if there had been no change in the law of 1902, neither Lord Dunleath nor Blackburn, as his assignee, would have been entitled to apply for a certificate at the October Licensing Sessions in the character of transferee of the old license. This would have been their right if the old house had been merely taken down and re-built with or without some small structural alterations; but counsel for the appellant has not ventured to present the case in this aspect, and it is admitted that under the old law the only possible application would have been for a new license. It is at this point that the Licensing (Ireland) Act, 1902, comes in; this is a drastic piece of legislation, prohibiting the granting of new licenses for the sale in Ireland of intoxicating liquors between the 31st July, 1902, and the 31st December, 1907, save in certain specified cases.

The question to be decided is whether the Dunleath Arms comes within any of these exceptions. In the argument in this

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Court, the only exception relied on is that contained in the 6th section; and I think that no assistance is to be gained from the antecedent provisions.

Section 6 enacts that "nothing in this Act shall operate to prevent the granting of a new license, where the licensing authority thinks fit, to premises attached to or adjoining premises licensed for the sale of intoxicating liquors at the date of the passing of this Act: provided always that such new license, as last hereinbefore mentioned, shall only be granted in order to render the said licensed premises more suitable for the business carried on therein." The first matter to be considered is whether on the 31st July, 1902, there were licensed any premises within the meaning of this section. Now, I am satisfied for the reasons given by Palles, C.B., that the license obtained by Askin in October, 1901, constituted the house licensed premises, even although after the surrender and transfer to Lord Dunleath, there was no one who could sell thereunder; and I should also be prepared to hold that if the house had been taken down for the purpose of being re-built, the license would not thereby have been lost or destroyed, but would attach to the restored house when it would come into existence. But before the end of July, 1902, the building occupied by Askin had disappeared for ever, and I am of opinion that the license had gone with it, for there was nothing then in existence or in contemplation to which the license could belong. Although the term "licensed premises" is to be found frequently in the Licensing Acts, it will be seen, if the code is looked at as a whole, that what is licensed is a house. The licenses authorized by 6 Geo. 4, c. 81, the earliest Act now in force in Ireland, are licenses to keep a common inn, ale house, or victualling house. By the first amending Act, 3 & 4 Wm. 4, c. 68, s. 1, the proper officers are empowered to grant licenses to the same persons, and at and for the same houses licensed in the last preceding year, on production of a prescribed certificate. So also, by sect. 2, provision is made for granting a new license to sell beer, cider, or spirits to be consumed in the house where sold, and elaborate notices are prescribed for the purpose of identifying the house to which the license is to attach. From the further amending statute, 6 & 7 Wm. 4, c. 38, it appears that the house

must be specified in the license. The Act 17 & 18 Vict. c. 89, s. 12, shows, I think, that the yard, out-buildings, and other adjuncts of the house are not included in the license. The object of this provision was to give the right of entry to the constabulary and police to every place connected with, or appertaining to, the licensed house; but its terms are quite inconsistent with such adjuncts being covered by the license, so as to allow the sale of drink therein. I am, therefore, of opinion that when Askin's house was levelled, without any intention of restoring it, there ceased to be premises licensed for the sale of intoxicating liquors, and, therefore, that no such premises existed at the crucial date. But even if by some metaphysical reasoning the old license was to be regarded as still subsisting on the 31st July, 1902, I am satisfied that without a straining of language to which, even for the purpose of avoiding hardship, I do not feel myself at liberty to resort in the interpretation of a statute, I cannot regard the new structure as "attached to or adjoining premises licensed for the sale of intoxicating liquors." These words must refer to something in existence; and, as I have already pointed out, Askin's publichouse had ceased to exist potentially, as well as actually. Palles, C.B., has laid stress on the concluding proviso, and it is valuable as showing that the continued existence of the premises formerly licensed is contemplated. But although I am disposed to think that the business intended to be conducted in the new premises is quite different in both character and extent from that carried on in the old, this was a matter on which evidence might have been given if the ruling of the County Court Judge on the antecedent questions had not put an end to the case. Being of opinion that this ruling was correct, I hold that the Divisional Court was right in discharging the conditional order.

I add a few words as to what has been called hardship. Lord Dunleath, or his lessees, laid out £3000 in the honest belief that the licensing authority would have given a license for the new premises if the law permitted. A change of law in the interests of the general public, but not contemplated, deprived the relator of the right of applying to the Licensing Justices, and to this extent he is a sufferer. But a statute cannot be construed by cases of individual hardship. If, after

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buying up Askin's license, Lord Dunleath's lessee had proceeded to build his new public house on the opposite side of the street, it is admitted that he could not have obtained a license, and yet the hardship would have been the same. A case is to be found in a recent number of the Irish Reports—*The King (Kennedy)* v. *Justices of Antrim* (1)—not unlike the present. The holder of a publican's license in Carnlough expended £500 in building new and more suitable premises adjoining his existing licensed house, on ground held under the same tenancy, and connected with the old house by a continuous wall which surrounded both houses. This was done pursuant to a covenant in a lease dated the 31st October, 1901, and was completed before the annual Licensing Sessions of 1902, at which it was held that an application for a license for the new house was not within the sixth section, inasmuch as that provision applies only where the new license includes the premises previously licensed. This was confirmed by four Judges of the Divisional Court, and is in accordance with the construction I have given the section; but as the time for appealing has not expired, I am not to be understood as expressing an opinion on the *facts* of that case. It shows however that the Trust Company is not the only sufferer from the recent legislation. It is moreover consoling to know that the hardship is merely temporary.

After the 31st December, 1907, the Company, if the Licensing Authority approves, will be able to open the hospitable doors of the "Dunleath Arms," and to try to pay a dividend limited to five per cent. by furnishing the topers of Ballywalter with attractions hitherto unknown in that simple village.

Solicitors for Blackburn: *Galway & Boaz.*
Solicitor for Carmichael: *John Hanna.*
Solicitor for Warnock: *John M'Kee.*

G. Y. D.

(1) [1903] 2 I. R. 671.

THE KING (AT THE PROSECUTION OF PETER THOS. ROE) *v.* THE COUNTY COURT JUDGE AND CHAIRMAN OF QUARTER SESSIONS AND OTHER JUSTICES OF THE PEACE FOR THE COUNTY OF ROSCOMMON (1).

K. B. Div. 1903.
April 20. May 4.
Appeal.
Nov. 3, 4. Dec. 4.

Licensing law—Certificate entitling applicant to obtain renewal of license—Certificate as to manner in which publichouse has been conducted in the past year—Publichouse closed and no liquor sold therein, except on two or three days during the year—17 & 18 Vict. c. 89, s. 11—Certiorari to quash order made on appeal from Petty Sessions to Quarter Sessions.

An application was made to the Annual Licensing Petty Sessions on 25th September, 1902, on behalf of E. P., who was not present, for a certificate to enable her to renew a publican's license of certain premises, of which she was tenant, and which were already licensed in her name. The constabulary opposed the issue of the certificate on the grounds that the premises had not been conducted as a publichouse for two years, and that there was no stock of liquor therein during the preceding twelve months. Evidence in support of the objection was given by a police sergeant. No evidence to contradict it was offered on behalf of the applicant, and the magistrates refused the certificate. The applicant appealed to Quarter Sessions on the 13th October, 1902, and the Chairman and Justices heard the evidence of the police sergeant, and also of the applicant, who swore that from 22nd September, 1902, to 25th September, 1902, and from that date on to the date of the appeal, she had kept the premises open for sale of, and had in fact sold, drink, and gave instances and particulars of such sale. The Chairman and Justices, on this evidence, granted the certificate. The prosecutor applied for and obtained a conditional order for a *certiorari* to bring up and quash the order so made at quarter sessions, and the applicant showed cause against the conditional order. The King's Bench Division having allowed the cause shown:—

Held, by the Court of Appeal, that in order to entitle the applicant to the certificate there must have been a continuance of the trade in the past year; that in the absence of any explanation of the non-user of the premises as a publichouse during the greater part of the year, the evidence of the sale of drink to a few persons on the three days before the Licensing Sessions was not evidence on which the Chairman and Justices were at liberty to infer that the

(1) In the King's Bench Division, before LORD O'BRIEN, L.C.J., and JOHNSON and KENNY, JJ.

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premises were conducted as a publichouse in the year previous to the Licensing Sessions, and that the conditional order for the *certiorari* should be made absolute.

R. (*Jones*) v. *Justices of Co. Kerry* (*Meagher's Case*) (31 I. L. T. R. 47) overruled.

An order made by the Chairman and Justices at Quarter Sessions, on an appeal from the decision of the magistrates at Petty Sessions, is subject to review in the King's Bench Division, and may be quashed on *certiorari*.

In re Russell (22 L. R. Ir. 487) considered.

MOTION to make absolute a conditional order for a writ of *certiorari*, notwithstanding cause shown.

Eliza Prenty obtained at the October Quarter Sessions in 1900 a certificate entitling her to take out a publican's new license for premises in Church-street, Strokestown. At the time of granting this certificate certain repairs and improvements, the cost of which came to £300, were being carried out on the premises, and she did not sell any liquor therein until the month of September, 1901. At the annual Licensing Petty Sessions, held on 26th September, 1901, the constabulary opposed the grant of a certificate for the renewal of the said license on the ground that the premises had not been opened for the sale of drink for the preceding twelve months; and it was proved that no drink was sold on the premises until the morning of the application for renewal. The Justices adjourned the hearing of the application for the said certificate for the production of the license, and told the applicant to sell drink during the interval of the adjournment; and on the case again coming on for hearing, her application was granted. She did not, however, take out her license until some time in the month of September, 1902, and she admitted to the sergeant in the constabulary who had charge of the case that on the 20th of that month she had no license for the premises. Prior to the 20th September there was no stock of liquor of any kind in the house, the shutters of the shop had not been taken down, but were nailed up, and there was no floor, or counter, or fixtures of any kind in the shop. The Annual Licensing Sessions were held on 25th September, 1902; but as Eliza Prenty had taken out no license for the premises at the time for serving notice of opposition, she was not served with any such notice. The constabulary, however, again opposed the

granting of a certificate for a renewal at these Sessions on the grounds that the premises had not been conducted as a publichouse for two years; that there was no stock of liquor therein; and that there had been no license in existence until five days before the Sessions. The sergeant proved these facts. Miss Prenty was not present, but her brother applied for an adjournment to enable her to give evidence. The Justices declined to adjourn, and refused the certificate. The applicant appealed to Quarter Sessions, and the appeal was heard on 13th October, 1902. The sergeant repeated his former evidence; the applicant attended and proved that from the 22nd September, 1902, to the 25th September, 1902, and from that time till the hearing of the appeal at Quarter Sessions, she had kept the shop open for sale of drink, and had, in fact, sold drink, and she gave instances and particulars of such sale. She also produced and gave in evidence the license for the premises which she had obtained, and which bore date 20th September, 1902. Her brother, Michael Prenty, deposed to the same facts. No other evidence was given, and the Chairman and Justices at Quarter Sessions reversed the decision of the Justices at Petty Sessions, and granted the applicant a certificate entitling her to renew her license.

The District Inspector of the Royal Irish Constabulary applied for and obtained a conditional order for a *certiorari* to quash the order of the Chairman and Justices at Quarter Sessions; the affidavit on which this conditional order was granted set forth the objections of the constabulary to the renewal of the license and the several matters deposed to by the sergeant at the hearings at the Petty Sessions and Quarter Sessions; but it omitted to state the application for an adjournment made on the applicant's behalf at Petty Sessions, and while it admitted that the applicant was examined at Quarter Sessions, it did not set out the nature of her evidence, save that she produced the license dated 20th September, 1902, which was therein described as a "temporary Excise license." The affidavit then continued:—"The Crown Solicitor for the county Roscommon appeared on behalf of the police, and urged the County Court Judge and Justices assembled at the said general Annual Licensing Quarter Sessions to refuse the application, as they were legally bound so to do. On the hearing of the said

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appeal the County Court Judge declined to entertain the said objections, and advised the Justices accordingly, and the said Justices granted the said Eliza Prenty the said certificate of renewal of a license." The conditional order to remove the order of the Chairman and Justices into the King's Bench Division was granted on the grounds, "(1) that the said order was made without and in excess of jurisdiction; (2) that the said premises were not opened or conducted as a publichouse during the twelve months immediately preceding the date of the order; (3) that the applicant was not a licensed person within the meaning of the Licensing Acts, inasmuch as the said Eliza Prenty held a temporary Excise license and no other."

There were filed on behalf of Eliza Prenty three affidavits showing cause:—One, by herself, setting out the several facts on which she relied; one by her solicitor, deposing to the course of the proceedings at Quarter Sessions; and one by three joint deponents, who testified to having bought and consumed drink on some of the days mentioned by Miss Prenty, during which the house was open, and to having seen other customers on the premises. Both the applicant and her solicitor swore that it was not true, as stated in the District Inspector's affidavit, that the County Court Judge declined to entertain his objection; and they also deposed that the Judge heard all the evidence tendered by the constabulary, viz. that of the sergeant, and that he also heard Miss Prenty's own evidence in support of her appeal, and that he and the Justices believed and acted on her evidence in the matter.

The sergeant, who had given evidence on behalf of the police, made an affidavit in reply, repeating his former evidence, and concluding: "I swear positively the County Court Judge did not adjudicate on the objections put forward by the police; and said to the Justices assembled: 'Well, this looks a respectable-looking girl, and it would be a hard case to take her license away. You agree with me, gentlemen.' No more was said, and the application of the said Eliza Prenty was granted accordingly." One of the magistrates at Quarter Sessions, Mr. Timothy Rorke, made an affidavit stating that they had heard the evidence of all the witnesses, and believed and acted on that of the applicant and her brother; he said it was not true to state that they did not adjudicate

on the objections put forward by the police, adding that they did adjudicate thereon, deciding as a fact on the evidence of Miss Prenty and her brother that the premises had been open and kept open for the sale of liquor, and that liquor had been sold therein during the month of September, or before the 25th of September. He added that it was true, as stated by the sergeant, "that the County Court Judge said that Eliza Prenty looked a respectable girl. All the Justices considered her a respectable girl, and she gave her evidence in our opinion truthfully, and we believed her and acted upon her evidence and that of her brother, Michael Prenty."

The Solicitor-General (*Campbell, K.C.*) and *Cecil Atkinson*, in support of the motion.

Powell, for Eliza Prenty.

LORD O'BRIEN, L.C.J. :—

May 4.

In the argument of this case it was in the earlier stages of it suggested, or rather I should say directly and explicitly stated, that the magistrates did not entertain the police objections at all—that they were taken by the appearance of the applicant, and decided in her favour. I think the magistrate, Mr. Rorke, who made the affidavit was justified in doing so, and in coming forward and explaining the action of the Court of Quarter Sessions. The District Inspector stated in his affidavit that the County Court Judge "declined to *entertain* the objections of the police." Sergeant Healy stated that the County Court Judge "did not adjudicate upon" the objections of the police. These expressions were towards the close of the argument sought to be whittled down, but the expression of the District Inspector was "declined to entertain," and the expression of the sergeant was "did not adjudicate upon"; and the reference to the appearance, which was more than once sought to be made so much of, was that the Chairman said the applicant looked a respectable girl. It was alleged towards the close of the argument that "declined to entertain" meant "did not give effect to." If this was meant, it was an infelicitous form of expression, more especially as there was also used the expression "did not adjudicate upon." I say no more than that the language employed was infelicitous.

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It certainly justified Mr. Rorke coming forward and explaining the action of the Bench.

In dealing with this case, no doubt the affidavits that were sworn by the district inspector and sergeant of police should be carefully read; but at the same time the affidavit of the applicant and of her solicitor should be read with equal care, and also the affidavit of Mr. Rorke, the magistrate, who testified on oath that the magistrates believed the evidence of the applicant, Miss Prenty. It was for the magistrates to say which side they believed —that was their privilege and not ours. My view is shortly this, that it was for the magistrates, looking at all the facts of the case, to say whether they would grant the necessary certificate —looking at the actual condition of the house, such as it was; at the supply of drink to the public; at the conduct, so to speak, of the house at the time it was licensed: and the intention of the applicant—to say whether they would grant the certificate.

Now I think it is clear that the applicant never abandoned the idea of fully equipping this place as a publichouse. She spent upon it the considerable sum of £300. She took out the license in each year, for which she paid in each year £4 10*s.*, and then there was the evidence of user as a publichouse, the supply of drink to the public, which was considerably greater than in the *Killarney Case* (1), to which I will again refer.

I would like to say a word in reference to the case of *The Queen* (*Lambe*) v. *The Justices of Armagh* (2). Lord Justice Holmes, who delivered the leading judgment, put the ground of his decision very clearly. He says, at p. 68, "What are the Justices to certify? Is it not to the peaceable and orderly manner in which a licensed house has been conducted in the past year? Can these words apply to a house shut up and empty, or to a house only occupied as a private residence, or to a house used exclusively for carrying on a wholly different trade? To ask these questions is to answer them. In all business there may be cessations and interruptions; rebuilding or repairing the premises, death, illness, want of means, many other causes may keep up the shutters and close the door for a time; but the trade

(1) 31 I. L. T. R. 47. (2) [1897] 2 I. R. 57.

is not abandoned." Here it is plain that this lady never abandoned the intention of making this place a fully equipped publichouse. She expended the considerable sum of £300; she gets her license; she pays for it, and for some time drink is supplied. Was drink supplied there as from a publichouse? That was a question for the magistrates. Was what took place merely illusory? That was also a question for the magistrates. Drink was supplied on several days—a considerably greater number of days than in the *Kerry Case* (1), for in the *Kerry Case* (1) it was supplied for one day and one day only. In the *Kerry Case* (1) there was a discussion as to what was the effect of *Lambe's Case* (2). The magistrates held over their decision until a copy of the judgment in *Lambe's Case* (2) was procured, and in the meantime the license was taken out. I remember well that we had, during the argument of the *Kerry Case* (1), a discussion in this Court as to the meaning of the words in the statute, and my colleagues pointed out to me that the words were "in the past year" and not "during the past year"—"in" and not "during." Lord Justice Holmes, who was one of the Judges in *Lambe's Case* (2), considered it most carefully. My brother Johnson, who pointed out the important circumstance in *Morell's Case* (3), that the applicant did not wish to supply drink to be consumed on the premises, was also a member of the Court. So was my brother Madden, who takes a great interest in licensing questions. I think this is a far stronger case for the license than the *Kerry Case* (1).

I asked the Solicitor-General what did he say to the *Kerry Case* (1). His answer was that it was wrongly decided. Well, I can say this for the decision in the *Kerry Case* (1), that it was no perfunctory decision—that it was most carefully considered by each member of the Court. It was not challenged by appeal, it was decided some years ago, and the self-same authorities whom the Solicitor-General represents to-day apparently acquiesced in the decision—at least, they left it there, and did not appeal. They come here now to endeavour to quash the unanimous decision of the Court of Quarter Sessions, when the applicant has spent her £300, when she has paid the duty for two years, and

(1) 31 I. L. T. R. 47. (2) [1897] 2 I. R. 57. (3) [1900] 2 I. R. 492.

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after there has been the user she deposed to, and when there is not a shadow of imputation on her character. My judgment in the *Kerry Case* (1) was not a long one, because, as will be seen from the report, the case was fully thrashed out and observed upon by the other members of the Court in the course of the argument, during which every case on the subject was cited.

I also asked the Solicitor-General,—Suppose the house was substantially taken down to be repaired or re-modelled, or suppose it was blown down by a storm, or burned down, and that the repairs, re-modelling, or re-construction of the house, as the case might be, took eleven months and three weeks, and drink was supplied only for one week in the past year, what would he say? He answered that it was all a question of *bona fides* of the action of the applicant. If this be so, it must be remembered that the question of *bona fides* is pre-eminently a question for the magistrates. Suppose that a house is leased, or otherwise taken to be made a publichouse, and that, owing to straitened means, or to a strike amongst workmen, the building has to a certain extent progressed, but can in no sense be considered a house, then, though there may have been no default on the part of the applicant, he cannot get his license, because no premises exist. It is his misfortune, not his fault; but if the house, such as it is, in its actual condition may (a license having been granted and business carried on in it) be considered licensed premises, then it is for the magistrates, honestly and carefully considering the matter, to say whether the particular premises are licensed premises, and whether the business of a publican has been properly carried on there in the past year. I confess that I think, as long as the local tribunal is honest and fairly intelligent, there ought not to be so much difficulty in the matter. The magistrates with their local knowledge seem to me to be peculiarly qualified to deal with such a case. I mean a fair-minded bench of magistrates, not, of course, one filled with partizans assembled to support a particular applicant, but a bench actuated by a sense of responsibility, and bringing their minds discriminatingly and honestly to bear on all the circumstances of the case.

Now, take *Morell's Case* (2). The Lord Chief Baron says, at

(1) 31 I. L. T. R. 47. (2) [1900] 2 I. R. 492.

page 500—"Now, in my opinion, the supplying of half-a-dozen half-glasses of drink for consumption on the premises during a period of twelve months, unless there be something very special in the case, is not carrying on the trade of selling liquor for consumption on the premises. *De minimis non curat lex.* I do not, however, lay down as a proposition of law that the sale of even that quantity of liquor might not, under peculiar circumstances, be held to be a carrying on of such trade." He adds, "In every case its particular circumstances must be looked to." I quite agree with what my Lord Chief Baron says. What, then, are the particular circumstances here? £300 expended, £4 10*s.* paid for the license in each year; and now let me read what the applicant states in her affidavit, which, it is to be remembered, was believed by the bench. Every word of it should be read. Here it is—"I was examined, and deposed I had paid, on the 3rd day of September, 1902, the entire license duty to the Excise for the year ending 10th October, 1902, and that I received an ordinary full Excise license for that period, and my solicitor produced same, to which, &c., &c., I beg leave to refer. This is the license which is referred to in paragraph 1 of the affidavit of the said Peter Thomas Roe, as a temporary Excise license; but I say that it is not a temporary Excise license, but an ordinary full license. I also deposed before the County Court Judge and Justices that from the 22nd day of September, 1902, on to the 25th day of September, 1902, and from that time on to the time I was giving my evidence, I had kept my place open for the sale, and had in fact sold drink, and gave instances and particulars of said sale, and the County Court Judge and Justices believed me, and found that I had so kept my place open for sale, and did sell drink on the said premises, and reversed the decision of the Justices refusing my renewal as aforesaid. It is not true, as stated in paragraph 3 of the affidavit of Peter Thomas Roe, that the County Court Judge declined to entertain the objection of the said Peter Thomas Roe. The Judge heard all the evidence which the said Peter Thomas Roe offered in support of the objection, viz. that of Sergeant Healy, as appears by the said Peter Thomas Roe's own affidavit, and he also heard my evidence in support of my appeal; and he and the Justices acted on my evidence in the matter."

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This is what the applicant says. In conjunction with her affidavit, I will read the last paragraph of the affidavit of Mr. Rorke. He says: "It is true, as stated in the said paragraph, that the County Court Judge said that the said Eliza Prenty looked a respectable girl. All the Justices considered her a respectable girl, and she gave her evidence in our opinion truthfully, and we believed her and acted upon her evidence, and that of her brother Michael Prenty." This is the evidence of the applicant and of the magistrate, Mr. Rorke; and notwithstanding this evidence, we are asked to push the doctrine of *certiorari* so far as to quash the decision of the Quarter Sessions. I am unprepared for this extension of the doctrine applicable to the writ of *certiorari*. In my opinion, the decision at Quarter Sessions must stand, unless the elaborate judgment of the Lord Chief Baron in *In re Russell* (1) is overruled—a judgment in which the other members of the Court (Baron Dowse and Mr. Justice Andrews) concurred. No doubt, the latter case was one of *habeas corpus*; but the *ratio decidendi* is equally applicable to a case of *certiorari* and of *habeas corpus*.

But I wish to advert to what my brother Johnson, who was a party to the decision in *Morell's Case* (2), has pointed out, viz.: the desire of the applicant in that case not to carry on the business of publican at all. The Lord Chief Baron is reported to have said—"But in the present case it is apparent that not only was the principal trade the supplying of drink which was not to be consumed on the premises, but also that—whilst the applicants were unwilling actually to refuse drink to be consumed on the premises, were it applied for—they were not anxious to do so, nor were they willing to do so, until forced by actual demand. In my opinion they did not hold this house out to the public as a licensed publichouse; and the extremely small trade in drink sold to be consumed on the premises was not caused by any absence of wish of the public in that part of Belfast to be supplied, but by the desire of the applicants to refrain as far as possible from carrying on that trade, and by their action consequent thereon. They have succeeded so effectually in their desire that, in substance and reality, they have not carried on that trade at all."

(1) 22 L. R. Ir. 487. (2) [1900] 2 I. R. 492.

Now, in conclusion, take the grounds of challenge set out in the conditional order—first, that the orders were made without and in excess of jurisdiction. There was, in my opinion, ample jurisdiction to make the order the Court did make, and jurisdiction was in no respect exceeded. There was a licensed house, and there was evidence that it was properly used as a publichouse, and there was no imputation on the applicant. As to the second ground, that the said premises were not opened and conducted as a publichouse during the *twelve months immediately preceding the granting of the order*, there was evidence that they were so open and conducted. The Solicitor-General attempted to show that they were not conducted as a publichouse in the first year—that is, in the year preceding the last year; but this point—even if there were anything in it—was not taken in the conditional order, nor as far as I can see before the magistrates in Quarter Sessions. The third ground was that the applicant was not a licensed person within the meaning of the Licensing Acts, as the applicant, it was alleged, held a temporary excise license and no other. This was a very precipitate allegation indeed. There was absolutely no ground for it.

I think the application should be refused.

JOHNSON, J.:—

I am not free from doubt that the magistrates had evidence that this was a place, within the purview of the Licensing Acts, where a person could lawfully and properly be licensed to carry on the trade of a publican selling exciseable liquor for consumption on the premises. It would rather appear from the affidavits that it was without the ordinary arrangements for such a place, without counter, or bar, or shop fittings, or open public entrance, or supplied with stock for the accommodation of such of the general public as had occasion to resort to it for licensed refreshments, and it would seem that this has always been its condition. I am not satisfied that the few instances in which whiskey was supplied to, and paid for by, a few individuals were not colourable efforts to try and make it appear that the place was a publichouse kept open for sale of exciseable liquor within the authorities. However, it is not

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necessary to discuss the matter, as the decision of this Court will be that the renewal was properly granted.

KENNY, J.:—

If we were satisfied, on the facts of this case, that the applicant for the renewal had no *bona fide* intention during the year antecedent to her application of carrying on the business of a licensed publican, we ought to hold that she was not entitled to the certificate. But, unless we could clearly see our way to such a finding, I do not think that we should destroy the license.

I confess that I experience considerable difficulty in coming to the conclusion that the business was "conducted" in the past year. At the same time, I do not think that the applicant ever intended to abandon it. I would gather, though it is not very clear, that a considerable sum was expended on the premises in 1900, and, apparently, with the view of making them suitable for a publichouse. She paid the license duty, though not until nearly at the close of the year 1901. Her license was again renewed in 1901; but again she did not pay the duty until the month of September, 1902, nor did she open the premises for business until that month. The case is, undoubtedly, one that suggests an intention to conduct the business in what I may call an unreal way; but at the same time I am not wholly satisfied that the conduct of the business was a sham, or that the facts conclusively establish abandonment. I do not, therefore, dissent from the conclusion arrived at by the other members of the Court.

J. L.

Appeal. Nov. 3, 4. Dec. 4.

The prosecutor appealed to the Court of Appeal (LORD ASHBOURNE, C., and FITZGIBBON, WALKER, and HOLMES, L.JJ.).

The Solicitor-General and *C. Atkinson*, for the appellant:—

The applicant, though she obtained her certificate in 1901, did not take out her license until 20th September, 1902: from the Licensing Sessions in 1901 until the 20th September, 1902, she was not qualified to conduct the business of a publican; and in

fact she did not conduct any such business even colourably during that period: the house was closed; the shutters were up; there was no liquor in stock. The first appearance of conducting the business of a publican in the premises was made on 22nd September, three days before the hearing of the application at the Petty Sessions; but the sales on these three days were merely colourable. The house was not in fact conducted as a publichouse at all, and the applicant was, therefore, not entitled to a certificate that it had been conducted in a peaceable and orderly manner in the preceding year under sect. 11 of 17 & 18 Vict. c. 89: *The Queen* (*Morell*) v. *Justices of Co. Antrim* (1); *Reg.* (*Lambe*) v. *Justices of Co. Armagh* (2); *Reg.* (*Cox*) v. *Recorder of Dublin* (3). This is not matter of "merits," but is matter preliminary to the jurisdiction of the Justices: *per* Palles, C.B., in *The Queen* (*Morell*) v. *Justices of Co. Antrim* (1).

The notice of objection by the police to the issue of a certificate to a person applying for a renewal must be served seven days previous to the Licensing Sessions. This implies that the applicant must be then, at latest, a licensed person. The word "renewal" implies giving fresh vitality to something already in existence; here there was neither "license" nor "licensed person" in existence seven days previous to the Sessions: section 14 of 37 & 38 Vict. c. 69; sect. 77 of 35 & 36 Vict. c. 94. Therefore all the applicant would have been entitled to was a new license, and the magistrates had no jurisdiction to grant a renewal. *R.* (*Jones*) v. *Justices of Co. Kerry* (4) is not binding on this Court; it was not argued in that case that the magistrates had no jurisdiction.

Ronan, K.C., and *Powell*, for the respondent:—

This conditional order was applied for relying on *Price* v. *James* (5); but it was not a temporary license which the applicant held. She was entitled to an ordinary excise license. When the notice of objection was proved not to have been served on her, the magistrates at Petty Sessions should have adjourned the case that

(1) [1900] 2 I. R. 492, 499.
(2) [1897] 2 I. R. 57.
(3) 16 L. R. Ir. 424.
(4) 31 I. L. T. R. 47.
(5) [1892] 2 Q. B. 428.

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it might be heard in the presence of both parties. The affidavit, which was made for the purpose of obtaining the conditional order, does not mention the non-service of the notice of objection or the refusal of the magistrates to adjourn the case. Affidavits of this kind are within the rule that requires full disclosure to be made: *Reg.* (*Marshall*) v. *Chairman and Justices of Co. Tyrone* (1).

Certiorari does not lie to bring up and quash an order made at Quarter Sessions on an appeal from Petty Sessions: the Justices at Quarter Sessions had jurisdiction to consider and determine the law on the facts, as upon the evidence the Court determined them to exist. Here, on the evidence, the Court determined that the applicant's house was conducted as a publichouse during the year. The order of the Court is conclusive as to the existence as well as the sufficiency of evidence to support this finding: *In re Russell* (2).

The cases of *The Queen* (*Morell*) v. *Justices of Co. Antrim* (3) and *Reg.* (*Lambe*) v. *Justices of Co. Armagh* (4) are distinguishable, because in both those cases the licensed person had no intention to carry on the business of publican. Here the applicant had laid out £300 in getting the premises ready to carry on the trade. No stronger evidence of intention to carry on the business could be produced. *R.* (*Jones*) v. *Justices of Co. Kerry* (*Meagher's Case*) (5) is absolutely in point. The facts were before the Justices at Quarter Sessions, and they found as a fact that the business had been carried on in the year.

The Solicitor-General, in reply:—

Certiorari lies to quash this order: it requires express negative words to take away the right to it: *The King* v. *Morely* (6); *The King* v. *Jukes* (7); orders made at Quarter Sessions on appeal from Petty Sessions have been frequently quashed on *certiorari*: *The King* (*Hamilton*) v. *Justices of Co. Leitrim* (8); *The Queen* (*Marshall*) v. *Justices of Co. Tyrone* (1); *The Queen* (*Delaney*) v. *Chairman and*

(1) 32 L. R. Ir. 201, 205; [1894] 2 I. R. 246.
(2) 22 L. R. Ir. 487.
(3) [1900] 2 I. R. 492.
(4) [1897] 2 I. R. 57.
(5) 31 I. L. T. R. 47.
(6) 2 Burr. 1041.
(7) 8 T. R. 542.
(8) [1900] 2 I. R. 397.

Justices of Queen's County (1); *The Queen* (*Clarke*) v. *Chairman and Justices of Co. Wicklow* (2).

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Cur. adv. vult.

The judgment of the Court was delivered by—

HOLMES, L.J.:—

It will be convenient, before dealing with the questions of law arising in this case, to state the facts in so far as they are uncontroverted and material. Eliza Prenty obtained at the October Licensing Sessions, 1900, a certificate entitling her to receive a publican's license for a house in Strokestown, which had not been licensed during the previous year. She was at the time carrying out repairs in the premises at the cost of £300, which were not finished; and she did not sell any liquor until September, 1901. At the Annual Licensing Petty Sessions then held, the constabulary opposed the renewal of Miss Prenty's license, having previously given the usual seven days' notice of their intention so to do, on the ground that she had not carried on business in the preceding twelve months; but on proof being given that she had opened her premises for the sale of drink, and had sold drink for some time previous to the 26th September, 1901, a certificate for renewal was granted. No excise license, however, was taken out pursuant thereto until the 20th September, 1902; and up to that date there had been neither sales nor stock on the premises. The Licensing Sessions for that year were held on the 25th September; but as Miss Prenty was not a licensed publican at the time appointed for serving notice of opposition, no such notice was given, and the lady was not present. Some person, however, applied on her behalf for the certificate, whereupon the district inspector opposed its issue on the grounds:—(1) That the premises had not been conducted as a publichouse for two years; (2) that there was no stock of liquor therein during the last twelve months; and (3) that there had been no license in existence until five days before the Sessions. These facts were proved by a police sergeant, and although Miss Prenty's brother asked for an adjournment, the Justices refused the certificate. From this refusal she appealed

(1) 20 L. R. Ir. 167. (2) 26 I. L. T. R. 81.

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to Quarter Sessions, at which, after the sergeant had repeated his former evidence, Miss Prenty swore, to use her own words, "that from the 22nd September, 1902, to the 25th September, 1902, and from that on to the time when I was giving my evidence, I had kept my place open for sale, and had in fact sold drink, and gave instances and particulars of such sale." Except to this extent, the police testimony was uncontradicted; and upon the foregoing state of facts, the Court granted the certificate which it is sought to quash by the present proceedings. Some comments have been made on the district inspector's affidavit, that the County Court Judge declined to entertain his objections; but this merely means that he did not accede to them, and I assume that the Court was of opinion that the sale of drink in the manner deposed to by Miss Prenty justified the issue of the certificate.

Mr. Ronan relied upon there being no reference in the affidavit made for the purpose of the conditional order to the non-service of notice of opposition, and to the refusal of the magistrates to adjourn. He says that the non-disclosure of these matters is an infringement of the rule requiring as a condition precedent to a conditional order for the issue of a writ of *certiorari*, a full statement of all material facts; but as he does not suggest that these facts are relevant to the question of jurisdiction, or that their absence from the affidavit was in any way prejudicial to his client, I do not regard them as material.

The proposition relied on by the Solicitor-General, as the ground for a writ of *certiorari*, is that the jurisdiction of the Justices to grant the certificate required for renewal depends upon the premises having been conducted as a publichouse in the past year; and that although if there was any evidence of its having been so conducted, the King's Bench Division would not review the conclusion arrived at, the law is different if there is no such evidence. In that case, he argues that an erroneous decision would be corrected by the means of the writ of *certiorari*. He seeks to apply a principle which is sometimes stated in a terse but rather misleading form, that an inferior Court cannot acquire jurisdiction by a bad decision in point of law. Remembering the controversies that arose some years ago in *In re Sullivan* (1), in *The*

(1) 22 L. R. Ir. 98.

Queen v. *Sullivan* (1), and *In re Heaphy* (2), I am glad that I am not called on to formulate an abstract rule on this subject. Indeed, it would be impossible to do so without attaching such limitations and qualifications as would render it valueless as a guide. Fortunately it is unnecessary to make the attempt on the present occasion, inasmuch as in the case of certificates prescribed by the Irish Licensing Code, as part of the machinery for granting new licenses, transfers, or renewals, the matter has passed beyond the region of discussion. For thirty years it has been the practice of the King's Bench Division, acted on also again and again in this Court, to correct by writ of *certiorari* mistakes of law made by Justices in the performance of their duty. I know of no instance of the refusal of the writ where the Court was satisfied that there was legal error; and subject to a point as to appeals to Quarter Sessions, to which I shall presently refer, it was assumed during the argument that this is the law.

The sole question considered by the Divisional Court was, whether the sale of drink from the 22nd to the 25th September, as described by Miss Prenty, was evidence from which the Justices were at liberty to infer that the premises were conducted as a publichouse in the year previous to the Licensing Sessions. Looking at this question, apart from authority, I think that there could not be much doubt as to the answer. The certificate prescribed by 17 & 18 Vict. c. 89, section 11, without which a publican's license cannot be renewed, is to the good character of the applicant and to the peaceable and orderly manner in which such house has been conducted in the past year. This assumes that the house has been conducted as licensed premises in the past year—in other words, that the business of a publican has been carried on therein. The 82nd section of the Licensing Act of 1872 enacts that in Ireland a spirit grocer, before renewal, must produce a certificate from Justices at Petty Sessions to the peaceable and orderly manner in which his business was conducted during the past year. This is only expressing, in other and somewhat more precise language, what is prescribed in the case of a publican by the 11th section of the Act of 1854, already quoted;

(1) 22 L. R. Ir. 503, note. (2) 22 L. R. Ir. 500.

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and the one provision may be construed with the help of the other. The meaning is that during or in the year there must be a continuance of the trade. It is wholly inconsistent with this that from the 10th October in one year until the 20th September in the next there were neither sales, stock, nor license; and that there has been no explanation of this total cessation of business. The sale of drink to a few persons on the three days before the Licensing Sessions is not trading in the year. Outside a law Court, no one would venture to say that it was. This was the basis of the decisions in *Cox's Case* (1) and in *Lambe's Case* (2); and if these authorities are to be followed, there is an end of the matter, unless Mr. Ronan can sustain his proposition as to appeals. Indeed, were it not for *The Queen* v. *The Justices of Kerry* (3), it could not have been argued that there was any evidence to support the certificate. I was one of the Judges who heard the *Kerry Case* (3), and it seems to be very like the present. As to its circumstances, or even as to its existence, my memory is blank. It is possible that some explanation was given of the cessation of business beyond what is stated in the report. At least, I can give no other reasonable account of my coming to a conclusion distinctly repugnant to that in *Cox's Case* (1), which I argued, and to that in *Lambe's Case* (2), in which I read a considered judgment. As that decision was not appealed from, the Divisional Court could hardly do otherwise than follow it. We are, however, in a position of greater freedom; and we are all of opinion that in that case, as in this, there was no evidence to justify the grant of the certificate. I cannot profitably add anything on this branch of the licensing law to what I said in *The Queen* v. *the Justices of Armagh* (2); but to prevent misapprehension I should like to repeat the observations I then made as to temporary interruptions of business. Such an interruption may last the greater part or even the whole of the year; and yet it may be shown that it was a necessary incident in a continuing trade. But in the present case, neither at Petty Sessions, nor at Quarter Sessions, nor even in this Court, has there been any explanation of the premises not having been used as a publichouse.

This brings me to the second point raised by Mr. Ronan, to

(1) 16 L. R. Ir. 424. (2) [1897] 2 I. R. 57. (3) 31 I. L. T. R. 47.

which I have already made casual reference. Relying on *In re Russell* (1), he draws a distinction between a certificate granted at Petty Sessions and a certificate granted on appeal to Quarter Sessions, upon the ground that the last-named Court has, on hearing such an appeal, power to determine every question of law, including questions involving its own jurisdiction; and that, therefore, its order is conclusive as to the existence as well as of the sufficiency of evidence to support it. The distinction cannot arise from any difference in the character or dignity of the two Courts, for, from *Clitheroe's Case* (2) onward, orders made at Quarter Sessions, in the exercise of their original licensing jurisdiction, have been quashed on the ground of mistake in law. It is only when Quarter Sessions exercise appellate functions that immunity from review can be claimed.

I fail to see any foundation for this proposition in legal principle or in the provision giving the right of appeal in 18 & 19 Vict. c. 62, s. 2. Both Petty Sessions and Quarter Sessions are inferior Courts; both are dealing with the same subject-matter; the inquiry in both is directed to the peaceable and orderly conduct of the house in the past year; the certificate by whichever tribunal it is given is in the same words; the appeal is merely a re-hearing, and I cannot conceive why greater efficacy should be given to an erroneous decision in the one case than in the other. *In re Russell* (1)—the only authority referred to by Mr. Ronan—was a case of *habeas corpus*; but I agree with him in thinking that the reasoning of Palles, C.B., therein would equally apply to *certiorari*. It is, however, strange that although conditional orders for the issue of writs of *certiorari* with a view to quash orders made by Quarter Sessions in exercise of an appellate jurisdiction are not infrequent, I have been unable to find any reference to the distinction relied on in any other reported case.

I may mention *The Queen* (*Delaney*) v. *The Chairman and Justices of Queen's County* (3)—a licensing case. Another licensing case—*Marshall's* (4)—was the subject of much litigation, in the course of which conditional orders for the removal of certificates

(1) 22 L. R. Ir. 487.
(2) I. R. 11 C. L. 412.
(3) 20 L. R. Ir. 167.
(4) 32 L. R. Ir. 201, 205; [1894] 2 I. R. 246.

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made on appeal by Quarter Sessions were granted on at least two occasions. A third licensing case is *The Queen* v. *The Chairman and Justices of County Wicklow* (1). There were also conditional orders to bring up orders of Quarter Sessions on appeal in *Drohan's Case* (2), and in *Hamilton's Case* (3). In *The Queen* v. *The Commissioner of Valuation* (4) the order sought to be removed was made by Quarter Sessions on appeal from the Commissioner of Valuation. In three of these cases the order was made absolute by the Divisional Court; and we have been referred to unreported cases in which it is said there was a similar result.

But I do not use them as deciding the point under consideration. Their value is to show that it never seemed to occur to either Court or counsel that the principle laid down in *In re Russell* (5) would operate as a bar to the King's Bench Division, quashing orders of Quarter Sessions made on appeal. The corrective jurisdiction of that Division over Justices who fall into error in administering the Licensing Laws is, in my opinion, most salutary; and it ought not to be restricted without the gravest reason. On both principle and authority it ought to be exercised in this case, and, therefore, the appeal must be allowed.

Solicitor for the prosecutor: *Sir Patrick Coll.*
Solicitor for the applicant: *Gaynor.*

G. Y. D.

(1) [1901] 2 I. R. 130.
(2) *Ibid.* 548.
(3) [1900] 2 I. R. 397.
(4) [1901] 2 I. R. 215, 224.
(5) 22 L. R. Ir. 487.

THE KING (SECRETARY OF STATE FOR WAR) *v.* JAMES GOFF, one of the Taxing Masters of the Supreme Court of Judicature in Ireland (1).

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Military Lands Act, 1892 (55 & 56 *Vict. c.* 43), *s.* 2—*Costs of local public inquiry—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 34 —*Lands Clauses (Taxation of Costs) Act*, 1895 (58 & 59 *Vict. c.* 111)—*Taxation of costs by Master—Jurisdiction of Court to review taxation*—Certiorari.

Lands belonging to P. were taken by the Secretary of State for War, under the Military Lands Act, 1892 (which incorporates, with some immaterial exceptions, the Lands Clauses Consolidation Act, 1845), and the amount of the purchase-money and compensation payable to P. was determined by arbitration, the sum so awarded being greater than the sum offered by the Secretary of State. The costs having been referred for taxation to a Taxing Master, under the provisions of the Lands Clauses (Taxation of Costs) Act, 1895, the Taxing Master allowed to P. (*inter alia*) the costs incurred by him in connection with the public local inquiry held in pursuance of sect. 2 of the Military Lands Act, 1892:—

Held, that the Taxing Master had no jurisdiction to allow such costs.

But *held*, that the function of the Master in taxing costs under the Lands Clauses (Taxation of Costs) Act, 1895, is ministerial merely, and not judicial, and that therefore his certificate, allowing the costs of such inquiry, could not be quashed on *certiorari*.

Certiorari.

This was an application on behalf of the prosecutor to make absolute a conditional order for a writ of *certiorari*, to remove, for the purpose of being quashed, the certificate of the taxation of the costs of James E. Penrose incurred in "*In re Military Lands Act*, 1892, *and Cork Camp Field*," on the grounds that said certificate was made without and in excess of jurisdiction; that the Taxing Master had no jurisdiction to deal with any costs of any preliminary negotiations antecedent to the service of the notice to treat; and that the costs of the vendors in the local inquiry held

(1) Before Lord O'Brien, L.C.J., and Gibson and Madden, JJ.

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on the 14th January, 1901, were not costs of and incidental to the arbitration. The facts, as appearing from the affidavit on which the conditional order was obtained, were as follows:—

Pursuant to the Military Lands Act, 1892 (hereinafter called the Act of 1892), His Majesty's Principal Secretary of State for the War Department (hereinafter called the Secretary of State), upon the 10th December, 1900, duly served upon James E. Penrose (the owner of the lands hereinafter mentioned) a notice in writing that he intended to purchase and take, under the Act of 1892, the field known as the Camp Field, situate near the military barracks, in the city of Cork, for the purpose of the drilling, &c., of troops, and intended to obtain the sanction of Parliament to such purchase, and by the notice inquired if Mr. Penrose assented to or dissented from the taking of his land, and requested him to forward to the Secretary of State any objections he might have to his lands being taken. Mr. Penrose objected to his lands being taken, and forwarded his objections to the Secretary of State.

Upon the 14th January, 1901, the Secretary of State, pursuant to the Act of 1892, caused a public local inquiry, of which due notice was given, to be held by Lieut.-Col. E. Cotter into the objections made by Mr. Penrose. Mr. Penrose appeared at the inquiry by his counsel and solicitor, and attended himself, and gave evidence against the taking of his lands. After the inquiry was held the Secretary of State, being satisfied that the lands ought to be taken, made a Provisional Order under the Act of 1902 for their purchase, which was afterwards confirmed by Act of Parliament.

Subsequently, on the 23rd October, 1901, the Secretary of State served a notice on Mr. Penrose, pursuant to section 18 of the Lands Clauses Consolidation Act, 1845 (which is incorporated with the Act of 1892), that he required to purchase and take the said lands. Differences arose between the Secretary of State and Mr. Penrose with respect to the compensation claimed by Mr. Penrose for his interest in the lands, and, in pursuance of the statutes in that behalf, the matters in dispute were referred to two arbitrators, and an umpire was afterwards appointed. The arbitrators failed to agree upon the value of the premises, and the umpire made his award, dated the 16th June, 1902, adjudging

that the sum of £6856 was the sum to be paid to Mr. Penrose for purchase-money and compensation in respect of the premises. This sum was greater than the sum offered by the Secretary of State, and consequently, by section 34 of the Lands Clauses Consolidation Act, 1845, the costs of such arbitration and incident thereto became payable by the Secretary of State. On the requisition of the Secretary of State, these costs were, pursuant to the Lands Clauses (Taxation of Costs) Act, 1895, referred to Mr. James Goff, one of the Taxing Masters of the Supreme Court of Judicature in Ireland, to tax and settle as between the parties.

Amongst the costs claimed by Mr. Penrose as costs of and incidental to the arbitration and award were the costs of the preliminary inquiry before Lieut.-Col. Cotter. On the taxation before the Taxing Master objection was made on behalf of the Secretary of State to the allowance of the items relating to the preliminary inquiry, but the Taxing Master allowed a number of these items, amounting in all to £15 12*s*. An objection in writing to such allowance was filed, and an application made to the Taxing Master to review his taxation in this respect; but he confirmed his decision in respect of the items in question, and made up his certificate allowing the same.

J. F. V. Fitzgerald, K.C. (with him *Cecil Atkinson*), on behalf of the prosecutor:—

Although the conditional order is for a writ of *certiorari* to quash the whole certificate, all we really seek is to quash the portion which allows the costs of the public local inquiry. Two questions arise: first, whether the Taxing Master had jurisdiction to allow these costs; secondly, whether his decision can be reviewed by *certiorari*. Upon the first question we submit that such costs are not costs of or incident to the arbitration within the meaning of section 34 of the Lands Clauses Consolidation Act, 1845, and section 1 of the Lands Clauses (Taxation of Costs) Act, 1895. The arbitration does not commence until the arbitrators are appointed: *Fitzhardinge* v. *Gloucester and Berkeley Canal Company* (1); *Gray* v. *North-Eastern Railway Company* (2). The

(1) L. R. 7 Q. B. 776. (2) 1 Q. B. D. 696.

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object of the public local inquiry, held under section 2 of the Military Lands Act, 1892, is to determine the suitableness of the lands for the purpose for which they are sought to be taken, and to give persons who own lands in the neighbourhood which are not proposed to be taken, and the owners of which will not therefore be entitled to compensation, an opportunity of objecting. The amount of compensation to be paid for the lands taken is not dealt with in that preliminary inquiry. It is impossible to hold that the costs of that inquiry can be incident to an arbitration which may never take place, inasmuch as after the inquiry the Secretary of State may consider that the lands are not suitable for the purpose; or the Provisional Order for the taking of the lands may not be sanctioned by Parliament, as required by the section; or the compensation may be assessed by a jury, and not by arbitration. Section 2 (sub-sections 4 and 9) of the Act of 1892 requires that the Provisional Order for authorising the taking of the land shall be confirmed by Parliament. If the Parliamentary Committee were of opinion that an objection at the preliminary inquiry was frivolous, they might award costs against the objector; but if such costs are to be considered as incidental to the arbitration, the extraordinary result would follow that if the compensation awarded was greater than the amount offered, the Taxing Master would be bound to award against the Secretary of State the very same costs which the Parliamentary Committee had awarded against the objector.

Upon the second question we submit that the decision of the Taxing Master when taxing and settling the costs under the Lands Clauses (Taxation of Costs) Act, 1895, can be reviewed by *certiorari*. Such costs are not regulated by orders of Court, and the Taxing Master, therefore, exercises judicial and not merely ministerial functions. He does not act as an ordinary Taxing Master: *per* Lindley, L.J., *Earl of Shrewsbury* v. *Wirral Railway Committee* (1). Cockburn, C.J., in *Owen* v. *London and North-Western Railway Company* (2), suggests that *certiorari* might lie if the Taxing Master had proceeded on a wrong principle; and the same view is taken in Browne and Allan on Compensation, 2nd ed.,

(1) [1895] 2 Ch. 812, at p. 816. (2) L. R. 3 Q. B. 54, at p. 60.

p. 607. In *Sandback Charity Trustees* v. *North Staffordshire Railway Company* (1) Bramwell, L.J., thought that *certiorari* would not lie; but in that case the Taxing Master had acted within his jurisdiction. If *certiorari* does not lie here, there is no other remedy, since the Court has no jurisdiction over the taxation on a motion to review: *Tennant* v. *Borough of Belfast* (2); *Owen* v. *London and North-Western Railway Company* (3); *Sandback Charity Trustees* v. *North Staffordshire Railway Company* (1). [He also referred to *Rhodes* v. *Airedale Drainage Commissioners* (4); *The Queen* v. *Commissioner of Valuation and Great Southern and Western Railway Company* (5).]

Conner, K.C., and *W. G. Jefferson*, for James E. Penrose:—

Certiorari does not lie. The Taxing Master when taxing costs in these cases acts ministerially merely, and his certificate has no effect in determining the liability to pay the costs; the circumstance that the taxation of costs is referred to him under the Lands Clauses (Taxation of Costs) Act, 1895, as *persona designata* is immaterial: *The Metropolitan District Railway Company* v. *Sharpe* (6); *The Queen* v. *County Court Judge of Tyrone* (7). The suggestion of Cockburn, C.J., in *Owen* v. *London and North-Western Railway Company* (3), that possibly *certiorari* might lie, finds no support in any of the other judgments delivered in that case; and until the present case no attempt has ever been made to carry the suggestion into effect. The prosecutor is in this dilemma: either the Taxing Master acted within his jurisdiction, in which case *certiorari* will not lie; or he acted without jurisdiction, in which case also the Court will refuse *certiorari*, inasmuch as the certificate of taxation will impose no liability; and if these costs are not properly payable, it will be open to the prosecutor to raise this defence, should we bring an action for their recovery. If the Legislature had intended that the taxation could be reviewed by the Court in these cases, the power would have been conferred by express words: *Sandback*

(1) 3 Q. B. D. 1.
(2) 11 Ir. L. R. 290.
(3) L. R. 3 Q. B. 54.
(4) 1 C. B. D. 380.
(5) [1901] 2 I. R. 215.
(6) 5 A. C. 425.
(7) 10 L. R. Ir. 217.

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Charity Trustees v. *North Staffordshire Railway Company* (1), *per* Bramwell, L.J.

Cecil Atkinson, in reply:—

The Queen v. *County Court Judge of Tyrone* (2) is distinguishable; the costs there were taxed according to a schedule of costs prescribed by rules.

Nov. 17.

LORD O'BRIEN, L.C.J.:—

This case presents for our determination two important questions—first, whether the words "costs of any such arbitration and incident thereto" in the 34th section of the Lands Clauses Act of 1845 may include the costs incurred by an owner whose lands are declared suitable to be taken for military purposes in a local inquiry held under the provisions of the Military Lands Act, 1892; and, secondly, whether a certificate of taxation of the Master of the Court, the person named and appointed to tax and settle the costs, can be quashed by *certiorari*—whether procedure by *certiorari* is applicable in such a case.

These are the questions which are presented for our determination, and the facts which give rise to these questions are as follows:—It appears that a local inquiry was held, under the Military Lands Act, 1892, as to whether the lands known as the Camp Field, near the military barracks, in Cork, were suitable for certain military purposes. That inquiry was made pursuant to statutory authority. It appears that Mr. Penrose, the owner of the lands, objected to their being taken. However, the local officer, Colonel Cotter, held that the lands were suitable for the purposes suggested, and the Secretary of State for War then determined to take the lands. A Provisional Order was made, pursuant to the Military Lands Act, 1892, and was afterwards confirmed by Act of Parliament. The owner of the lands and the Secretary of State for War failed to agree as to the price. Arbitrators were named, and they also failed to agree. The matter was then referred to an umpire, and he awarded a sum of over £6800. Then arose the question of costs, and this was referred

(1) 3 Q. B. D. 1, at p. 5. (2) 10 L. R. Ir. 217.

to one of the Taxing Masters of the Supreme Court, under the provisions of the Lands Clauses (Taxation of Costs) Act, 1895, section 1 of which enacts that "where, under the Lands Clauses Consolidation Act, 1845, or any Act incorporating the same, any question of disputed compensation is determined by the verdict of a jury, or by arbitration, the costs of and incidental to the inquiry or to the arbitration and award (as the case may be) shall, if either party so requires, be taxed and settled as between the parties by one of the Masters of the Supreme Court." The Master in taxing the costs included not only the costs of the arbitration strictly so called, but also the costs of the preliminary local inquiry. This portion of his taxation, that is to say, as to the costs of the local inquiry, has been challenged, and it is said that he had no jurisdiction to include these costs.

Now, then, are the costs of the local inquiry costs of and incidental to the arbitration and award? We are all clearly of opinion that they are not. The local inquiry and the arbitration and award are absolutely distinct matters—separate and distinct proceedings under different Acts of Parliament. The local inquiry is a proceeding under the Military Lands Act of 1892, and the arbitration and award take place under the Lands Clauses Act, 1845. It does not at all follow that because there is a local inquiry there shall be an arbitration and award. The lands proposed to be taken may, in the opinion of the local officer, prove unsuitable, and in that case nothing further takes place. If, on the other hand, the Secretary of State for War determines to take the lands, then there is to be a notice to treat, and if the parties, the Secretary of State for War and the owner of the lands, fail to agree, there is a new starting-point, a new *terminus a quo*. Any step thenceforth is incidental to the arbitration and award, and the costs of such step and of the award are exclusively the costs to be comprised in the expression "costs of and incidental to the award." These costs plainly do not comprise the costs of the preliminary local inquiry. As the matter is one of some general importance, we made inquiry as to what was the practice in England, and we find that it is entirely consonant with our view.

Mr. Conner did not contend that the view of the Taxing

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Master was right, but argued very clearly that proceedings by way of *certiorari* were not applicable. There remains, then, the important question, Can the taxation of the Taxing Master be challenged by *certiorari*? We think not. We think that in such a case the procedure by *certiorari* is inapplicable, because the Taxing Master's function is ministerial, and his certificate does not impose a final binding liability. The costs under the Act of Parliament are referred to him to be taxed and settled. The master has no judicial discretion to determine whether the parties shall or shall not get costs at all. His function is to ascertain an amount—to measure, moderate, and settle—and in doing this he is guided by rules of practice so far as they are applicable or can suggest an analogy. This is not a judicial act in the sense in which the expression judicial act is understood in proceedings by *certiorari*. The function of the Taxing Master is merely ministerially to apply, in ascertaining an amount, certain rules of practice and the analogies they suggest; and clearly he cannot finally and conclusively determine the question of liability. It would be open, in the case of the Secretary of State for War, to him, or, in the case of private individuals, to them, in a proceeding for an injunction, or in the defence of an action, to show that the Taxing Master exceeded his authority, and that accordingly his certificate was not final, conclusive, and binding.

We are, therefore, of opinion that this certificate cannot be challenged by *certiorari*, and that the application on behalf of the Secretary of State for War fails.

GIBSON, J.:—

There are two questions for decision. The first is quite free from difficulty. The costs of and incident to the arbitration cannot possibly include the costs of the preliminary inquiry, held previous to the Provisional Order Statute under which the lands were subsequently acquired and the arbitration took place. The Taxing Master entirely exceeded his jurisdiction when he taxed and certified the costs of such inquiry as part of or incident to the costs of arbitration. It is suggested that as he had jurisdiction to inquire what costs were incident to the arbitration, his decision, though erroneous, was *intra vires* and binding. No

doubt, he was authorised to ascertain the costs incident to the arbitration; but he cannot, by an erroneous ruling, extend such costs so as to cover items which had no more legal connection with the arbitration than if they related to a different estate not compulsorily acquired at all. Suppose the Taxing Master mistakenly ruled in a case that there had been no previous offer of an amount exceeding the amount awarded (a question which might present difficulty)—*Miles* v. *Great Western Railway Co.* (1)—and proceeded to tax the costs on the assumption that the promoters were liable under sect. 34, it would seem plain that if there had been in fact and law such offer, the section would give no costs and the certificate of taxation would be void and impose no liability.

Secondly, if there was no jurisdiction to tax the costs of the preliminary inquiry, can the certificate in relation thereto be quashed on *certiorari*? There is no decision on the point; but there are *dicta* of eminent Judges suggesting the possibility of such remedy, and a well-known text-book adopts that view. I shall consider the question on principle. What is the position of the Taxing Master settling costs under section 34 of the Lands Clauses Act? What is the effect of his certificate?

Under the Lands Clauses Act, section 34, the costs of the arbitration were usually settled by the arbitrators in an instrument subsequent to, and distinct from, the award of compensation: *Gould's Case* (2). The arbitrators' taxation imposed no liability; and whether the costs were settled by the arbitrators or not, the statutory right given by the section against the promoters could be enforced by action. If the arbitrators allowed costs beyond their legal competence, the promoters would not have been thereby bound; and they could, if sued, have pleaded that the award or taxation was *ultra vires* (see the judgment of Blackburn, J., in *The Duke of Buccleuch's Case* (3)).

The Taxing Master, substituted for the arbitrators in reference to costs, acts as *persona designata*, and not as an officer of the Court. This was decided as far back as 1847 by our Queen's Bench in *Tennant* v. *The Corporation of Belfast* (4), and there are many authorities since to the same effect. The Taxing Master is selected

(1) [1896] 2 Q. B. 432.
(2) 5 Ex. 214.
(3) L. R. 5 Ex. at pp. 229–232.
(4) 11 Ir. L. R. 290.

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to take the arbitrators' place because he is an expert; but he has no greater powers than they, and he is very much in the position of a sole arbitrator—*Earl of Shrewsbury's Case* (1); *Fraser* v. *Fraser* (2)—though his certificate cannot be set aside like an award. The Court cannot review or correct his taxation, but (as counsel admit) the certificate cannot create a debt or liability where none existed before, and the promoters can always show excess of jurisdiction. The case does not resemble an assessment of compensation and taxation under sections 51, 52, and 53.

Does the Taxing Master act judicially or ministerially? It is argued that his function under section 34 is judicial—(1) because the ultimate decision without any appeal rests with him; (2) because he settles the costs without any prescribed scale. The latter topic cannot alter the intrinsic nature of the transaction. The former ground is more plausible; but, on the whole, I think the Taxing Officer acts as minister, and not as judge. If an action was brought to recover costs under section 34 before taxation, and the Court referred the costs to its Taxing Officer, the duty of such officer would certainly be ministerial. In a sense, of course, all taxation involves judicial elements, as difficult points of legal principle may be involved, and decisions have to be considered and applied. Still, taxation of amount in obedience to a statutory duty thrown by section 34 on the Taxing Master instead of the arbitrators, appears to me, in its essence, like the duty of an ordinary Taxing Officer, to be ministerial: *Metropolitan District Railway Company* v. *Sharpe* (3).

If the function of the Taxing Master is ministerial, and his certificate *per se* creates no liability or obligation to pay, does *certiorari* lie? It is well settled that only judicial acts can be removed: Grady and Scotland, p. 139; *Reg.* v. *County Court Judge of Tyrone* (4). The act must also be final, and such as to impose an obligation: Grady and Scotland, p. 139; *Reg.* v. *County Court Judge of Tyrone* (4); *Ex parte Kingstown Commissioners* (5); *Rex* v. *Enniskillen Urban District Council* (6). The certificate here is only a step towards the ascertainment of legal liability; it

(1) [1895] 2 Ch. at p. 818.
(2) [1904] 2 K. B. 245.
(3) 5 A. C. at pp. 439, 440.
(4) 10 L. R. Ir. 217.
(5) 16 L. R. Ir. 150.
(6) [1902] 2 I. R. 452.

creates no debt; and so far as it is in excess of jurisdiction, it is inoperative. If the certificate had been under section 52, different considerations might apply.

Mandamus, which, in some of the cases on sect. 34, is associated by the Judges with *certiorari*, differs widely from that remedy. It may well be that a Taxing Master under sect. 34 could be compelled to proceed by mandamus: Shortt on Mandamus, p. 360; and in a difficult case it would be convenient for the Master to hold his hand to enable the Court to decide the points raised on mandamus. But whether he can be ordered to tax by mandamus or not, he is, in my judgment, free from *certiorari*; and his certificate, though erroneous and without jurisdiction, cannot be quashed. The remedy of the promoters is to refuse payment; and, if sued, they can defend on the ground of non-liability. Whether *certiorari* might not be applicable under sections 52 and 53 is a question not now before us.

MADDEN, J., concurred.

Conner, K.C., asked for the costs of the motion, and submitted that there was jurisdiction to give them against the Crown. He referred to ***Ex parte Doyle*** (1).

LORD O'BRIEN, L.C.J.:—

Even supposing that we could give costs, we will not, in the exercise of our discretion, do so.

Solicitor for the prosecutor: *Sir P. Coll.*
Solicitor for James E. Penrose: *A. W. Winder.*

J. G. T.

(1) 3 New Ir. Jur. R. 175.

K. B. Div. 1904. Nov. 14.

CYPREAN FABRE & CO. *v.* R. & H. HALL & CO. (1).

(1903. No. 12,590.)

Practice—Claim—Admission of—Counterclaim—Money lodged in Court—Drawing out of—Order XXII., Rule 6.

In an action for a liquidated demand, brought by plaintiffs carrying on business outside of the jurisdiction, the defendants admitted the claim and lodged in Court the full amount claimed, but set up a counter-claim for damages to a greater amount:—

The Court granted an application, under Order XXII., Rule 6, for an order, restraining the plaintiffs from drawing out the money so lodged until the matters in dispute in the counterclaim should be disposed of, notwithstanding that security for costs had been given by the plaintiffs.

THE action was brought by the plaintiffs, a firm of merchants carrying on business at Marseilles, and having no property within the jurisdiction of this Court, to recover from the defendants as indorsees of a bill of lading the sum of £321 13*s.* 2*d.* for balance of freight payable by the defendants to the plaintiffs for the carriage of a cargo of maize from Buenos Ayres to Waterford.

The defendants with their defence paid into Court the sum of £321 13*s.* 2*d.*, and counterclaimed for a sum of £869 4*s.* in respect of the alleged failure of the plaintiffs to deliver the cargo of maize in good order and condition in accordance with the terms of the bill of lading.

The defendants having taken out a summons to measure security for their costs, the plaintiffs were, by a ruling of the Master, directed to lodge £80 in Court as such security.

The defendants now moved for an order restraining the plaintiffs from drawing out of Court any money lodged by the defendants in satisfaction of part or the whole of the plaintiffs' claim until all matters in the action and counterclaim should be disposed

(1) Before PALLES, C.B., and BOYD and KENNY, JJ.

of, and that no payment should be made to the plaintiffs without an order of the Court on notice to the defendants.

Gordon, K.C., and *Ryland*, for the defendant:—

The plaintiffs are not entitled as of right to draw out the money lodged in Court. Order XXII., Rule 6, only authorises payment out of Court "unless the Court or a Judge shall otherwise order." The counterclaim is a substantial one, and the money should be allowed to remain in Court until it is disposed of.

Carrigan, for the plaintiffs.

[They referred to *Mersey Steamship Company* v. *Shuttleworth* (1); *Republic of Peru* v. *Dreyfrus, Bros. & Company* (2).

THE COURT made the following order:—

"IT IS ORDERED that the plaintiffs be restrained from drawing out of Court any money lodged by the defendants in satisfaction of part or the whole of the plaintiffs' claim until all matters in this action and the defendants' counterclaim be disposed of, without notice to the defendants, and that the costs of both parties of this motion be part of their costs in the counterclaim."

Solicitor for the plaintiffs: *A. D. Keane.*
Solicitors for the defendants: *Dobbyn & M'Coy.*

R. ST. J. C.

(1) 11 Q. B. D. 531. (2) 38 Ch. D. 348.

Lord O'Brien, L.C.J.
1904.
Dec. 8, 9.

WELLS *v.* JOYCE.

Money Lenders Act, 1900—*Re-opening transaction—Payment by monthly instalments—Default clause—Harsh and unconscionable transaction—Excessive rate of interest.*

In response to an advertisement by the plaintiff, an English registered money-lender, offering advances without publicity, "repayable by easy instalments," the defendant, an Irish farmer, on the 5th March, 1903, applied for and obtained an advance of £70 on his note for £100, £25 whereof was repayable in five monthly instalments, and the balance (£75) payable on the 5th September, 1903, with a clause that, on default in payment of any instalment, the whole debt should become due and payable. This note was paid off, and a renewal in the same terms was made on the 5th September, 1903, a note being given in the same form, and £70 being advanced. Of this the defendant paid four instalments of £5 each, and a writ having been issued against him for £80, he paid a sum of £30 and signed a new note for £74 in April, 1904, payable by five consecutive monthly instalments of £5 each, and the balance (£49) on the 15th October, 1904. On foot of this note he paid £5, and the writ in the present action was issued for the balance of £69 in July, 1904:

Held, that the transaction was harsh and unconscionable, within the meaning of the Money Lenders Act, 1900, and should be re-opened, judgment being entered for a sum which the Court considered reasonable as representing unpaid principal and interest.

THIS was an action by a registered money-lender named Charles Wells, of Corridor Chambers, Leicester, against Thomas Evans Joyce, a farmer, residing at Ashmount, Leenane, county Galway.

The defendant, having seen an advertisement in a local newspaper, applied to Wells for a loan of £150. The advertisement was in the following terms:—

"Cash advanced, £10 to £5000, on note of hand alone, without bonds, publicity, or charges of any description whatever unless business is done. No bills of sale, and the strictest privacy guaranteed. On receipt of application representative will wait upon you by appointment, and advance the amount required, payable by easy instalments to suit your own convenience. Special rates for short periods.

"Write in confidence to actual lender, C. Wells, Corridor Chambers, Market-place, Leicester. N.B.—No connection with loan offices or so-called banks and companies."

In reply to his application Joyce received a printed form in the following words:—

"LEICESTER, *Feb. 20th*, 1903.

"DEAR SIR,—I am in receipt of your application of the 18th for loan of £150. In reply I beg to state that it is my invariable rule not to entertain any application until my valuer has visited the residence of the applicant, had a personal interview, and inspected the proposed security; therefore, on receipt of enclosed application form, correctly filled in and signed, I shall at once instruct him to call upon you by appointment. You may rest assured that the valuer's visit will be strictly private and confidential, and I have also to inform you that I do not issue prospectuses, as I deal with every case on its own merits, having due regard to the amount of advance, the mode of repayment, the quality and nature of the security offered, and the character of my customers; therefore, I am never in a position to state terms until the valuer has seen the applicant and his security; but in order to save all possible delay, trouble, and expense, he will take the amount with him in gold, or Bank of England notes, and he is empowered to advance the same there and then, upon the very lowest and fairest terms that the circumstances of your case will possibly admit, provided he finds your security and position satisfactory.

"All advances are made in full, and may be repaid by easy instalments, extending over a long or short period, or otherwise as may be agreed upon.

"There is absolutely no charge whatever unless business is done.

"I do not make any office charge, nor call upon customers to pay any of the usual loan office enquiry fees, but as a guarantee of the borrower's good faith, and the genuineness of the application, I require that the enclosed application form shall be correctly filled in, signed, and returned to me, as applications are sometimes made by irresponsible persons, whose position does not warrant the granting of the loan. No good application is ever refused, as I have always a large capital on hand; therefore, if you fail to obtain an advance from me, it will be useless for you to apply to any other office.

"I have the highest reputation, and do the largest personal advance business in the United Kingdom.

"On receiving the enclosed application form, properly filled up, the matter shall have my earliest attention.

"Awaiting your reply, I am, dear Sir,

"Yours respectfully,

"C. WELLS.

"MR. T. E. JOYCE, Leenane."

Defendant accordingly filled up a "form of application," setting out that he was a farmer, that he held three farms of land,

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and paid £102 a year in rent, that he required a loan of £150 on his personal security, to be repaid by half-yearly instalments.

The application was accompanied by the following letter from Joyce :—

"I am in receipt of your communication, also application form, which I enclose filled up. I am sure if you had known me you would not have any hesitation to advance me the amount I require. When shall I expect your agent? he may be able to call on me towards the end of this week."

A further letter was written by Joyce to Wells on the 26th February, 1903, as follows :—

"I have got your letter; the acreage of the farm upon which I reside is 260; I also hold two other farms. I have 750 sheep and thirty cattle. I should say my stock is worth well over £1000.

"As you prefer monthly payments, what would suit me best would be to pay £5 a month for the first five months; I could easily then, say about 20th August, pay £50, and balance in £5 or £10 monthly instalments as may be agreed upon; otherwise advance me whole amount for six months, at the end of which time I shall pay it back together; either of these suggestions will suit me, you can take your choice; I hope you will treat me well."

Eventually the plaintiff's valuer went to the residence of defendant, and having inspected the premises, &c., the valuer agreed to lend Joyce a sum of £70, for which the defendant gave a note as follows :—

"*March* 5, 1903.

"I promise to pay C. Wells, or order, at Leicester, the sum of £100 for value received, £25, part thereof, repayable by five consecutive monthly instalments of £5 each, payable on the fifth day of each succeeding month, first of such instalments to become due and payable on the 5th day of April, 1903, and £75, the balance thereof, to be paid on the 5th day of September, 1903. Should there be default in any one or more payments, the entire amount left unpaid becomes due and payable on demand.

"THOMAS EVANS JOYCE,
"Ashmount, Leenane, Co. Galway,
"Farmer."

Joyce, out of the £70 received, paid the valuer a sum of £3 for his travelling expenses, &c., so that he actually received £67 for the £100 note.

Instalments of £5 each were duly paid for the months of April, May, June, July, and August, and on the 3rd September, 1903, £70 was sent to Wells, with the following letter :—

"I enclose you half-notes for £70, in payment of balance of £75 due to you. I shall send you the other £5, together with corresponding half-notes, when I hear from you. I would have sent you the £5 to-day, but it failed me to get suitable change.

"I will require the accommodation of £50 or £100 for six or twelve months, and I expect you will lend it to me at a fair rate of interest. Will you please let me know the lowest you will charge me?"

To this letter Wells replied as follows :—

"Yours to hand with enclosures. It is against my rule to increase an account, and therefore will advance you the £70 again on the terms of the enclosed promissory note. On receipt of same, duly signed where marked, together with the second halves of bank-notes, also £5 note, which will settle existing loan, will forward the above amount in notes to complete."

On the 7th September, 1903, Joyce sent Wells the second half-notes for £70, and a money order for £5, thereby fully discharging the note of the 5th March. On the 8th September Joyce sent Wells a new promissory note on the following terms :—

"*5th September*, 1903.

"£100.

"I promise to pay Charles Wells, or order, at Leicester, the sum of £100 for value received, £25, part thereof, repayable by five consecutive monthly instalments of £5 each, payable on the 10th day of each succeeding month, first of such instalments to become due and payable on the 10th day of October, 1903, and £75, the balance thereof, to be paid on the 10th day of March, 1904. Should there be default in any one or more payments, the entire amount left unpaid becomes due and payable on demand.

"THOMAS EVANS JOYCE."

On receipt of this note, viz. on the 10th September, Wells returned Joyce the same bank-notes for £70 that Joyce had already forwarded him, together with the old promissory note cancelled.

Joyce each month paid the £5 instalments for October,

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November, December, January, and February, the form of receipt always given by Wells being :—

"Received from Mr. T. E. Joyce, Ashmount, the sum of £5, on account of interest due under promissory note dated September 5th, 1903."

On the 8th March, 1904, Joyce wrote to Wells :—

"As the balance of loan is now due, and as stock are not saleable in this part of the country this time of year, it would suit me to renew the balance for six months. I hope you will be pleased to do this, as I could not possibly, without great inconvenience, pay it off now, and it will be no trouble to me to pay in September. Please send me a new bill for renewal, and much oblige."

Wells had instructed his solicitor to sue for the balance, and Joyce received the following letter from Mullan, the solicitor, dated the 15th March, 1904 :—

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"DEAR SIR,—Not having received any reply to my application of the 7th inst., I issued writ of summons, which is now in the hands of a civil bill officer for service. I am now requested by Mr. Wells to get your account reduced to £50, that is, you are to pay me £30 0*s.* 6*d.*, and £2 10*s.*, my costs incurred, and then Mr. Wells will make arrangements with you respecting the balance. If you fail to carry out this arrangement *at once*, I am instructed to proceed with judgment and execution. Yours truly,

"J. J. MULLAN."

To this letter Joyce replied on the 16th September :—

"I got your letter of the 15th inst. I wrote to Mr. Wells on 8th March. Not having heard from him, I wrote him again on yesterday. My letter must have miscarried. Please don't take any steps until you hear from him again. I hope you have not issued a writ as you state. I would not wish for anything to have proceedings taken against me. I was expecting to hear from him in reply to mine of 8th inst. I then wrote again to him on yesterday.

I received no letter from you till I got the one this morning. I asked him to renew the bill for a further time. I am sure had he got my letter he would have done so."

This was followed by another letter to Mullan on the 23rd

March asking for time for the payment of "the £30" and costs; and on the 5th April Joyce again wrote to Mullan :—

"I am now prepared to carry out the terms of your letter, namely, to pay you the £30 and your costs, £2 10*s.*, and arrange with Mr. Wells about the other £20. Please let me know by return will my doing this make the case settled."

To this letter Mullan replied on the 8th April as follows :—

"I duly received your letter of the 5th inst., and forwarded it to Mr. Wells, whom you should correspond with direct if you wish to settle the matter, as I cannot accept less than full amount and costs. I beg to refer you to my letter of 15th March, stating Mr. Wells' then proposal, but whether it will be accepted now or not I cannot say. In your letter you say you are now prepared to carry out Mr. Wells' terms, viz. to pay me £30 and £2 10*s.* costs, and arrange with Mr. Wells as to balance—of £50, not £20, as you state. As judgment cannot be marked till 14th inst., you had better try and arrange matter in the meantime. I, of course, must proceed until I am instructed by Mr. Wells that the case is settled, or that you pay me full amount, or that you arrange with me according to Mr. Wells' direction."

On receipt of this letter on the 9th April, Joyce wrote to Wells :—

"I had a letter from Mr. Mullan to-day. I am prepared to pay you £30 now, and arrange with you about the balance, or whatever portion of it you intend to charge. If this will make the case settled, wire to me on Monday to that effect. I could not wait to hear from you by letter, as the time is short. I must consult my solicitor on the matter on Tuesday if you don't settle. I think you have treated me badly. The original loan was £70, less £3 out-of-pocket expenses. I have paid you within the twelve months, in instalments, £55, so that you could easily enough renew the bill for me, considering that you were paid the whole of the loan except £12. I always paid you punctually, and you ought not to have exposed me. I would have paid you honestly if you had given me time; instead of that, you would not answer my letters."

Wells replied to this on the 11th April as follows :—

"Yours to hand. Forward the £30 0*s.* 6*d.* per return of post direct to me, and pay Mr. Mullan his costs. I will then forward bill for renewal of £50 on *pro rata* terms, viz., £24, £5 per month for five months, and £49 on the 6th month. Of course, if the above arrangements are not carried out at once, Mr. Mullan will be instructed to sign judgment, and issue execution."

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On the 13th April Joyce wrote to Wells:—

"I received your letter. I enclose you cheque, £30. I have also forwarded Mr. Mullan his costs. I feel very much how you have exposed me. Mr. Dickson could tell you that it would not be fair to press a man for payment in this part of the country this time of year."

Payment of the £30 was duly acknowledged by Wells, and, as requested, a new promissory note for £74 was signed by Joyce, viz.:—

"I promise to pay C. Wells, or order, at Leicester, the sum of £74 for value received, £25, part thereof, repayable by five consecutive monthly instalments of £5, the first of such instalments to become due and payable on the 15th day of each succeeding month hereafter until the said sum of £25 should be fully paid, and £49, the balance thereof, to be paid on the 15th October, 1904. Should there be any default in any one or more payments, the entire amount left unpaid becomes due and payable on demand."

On foot of this note Joyce paid an instalment of £5 on the 15th May, 1904, and on the 23rd May Wells wrote to him:—

"Take notice that unless you pay *your arrears* at once further proceedings will be taken to recover the whole balance now owing. *This is final*, and you will not be communicated with again. Therefore you had better pay, and save yourself a deal of unnecessary trouble and expense."

In the course of a letter in reply to this Joyce wrote to Wells:—

"I find that your system of doing business is most unjust, charging at least 150 per cent. for money. I never understood it until I consulted a solicitor after that time you took proceedings against me."

Finally, Wells wrote to Joyce, on the 29th June, 1904:—

"You having made default in payment of your instalments on loan. This is to give you due notice as required by law that, by the terms of the promissory note signed by you, the entire amount now owing, viz. £69 0*s.* 6*d.*, has thereby become due and payable forthwith. *This amount I now demand*, and unless same is received within four days from this date proceedings will be taken."

A writ of summons claiming £69 was accordingly issued on the 9th July, 1904.

Defendant, in all, received from plaintiff a net sum of £137, and had paid him £155 for principal and interest, there being still due to the plaintiff on the transaction the amount claimed.

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The defendant's case was that the excessive rate of interest charged rendered the transaction harsh and unconscionable, and that he did not understand the effect of the "default clause" in the promissory note, whereby default in any one or more payments rendered the entire amount left unpaid due and payable on demand. The question turned upon the effect of the Money Lenders Act, 1900, section 1, which provides that where proceedings are taken by a money-lender in respect of transactions entered into after commencement of the Act, "and there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premiums, renewals, or other charges are excessive, and that in either case the transaction is harsh and unconscionable, or is otherwise such that a Court of Equity would give relief, the Court may re-open the transaction."

Serjeant Dodd, *Seymour Bushe*, *K.C.*, and *Samuel Moore*, for the plaintiff.

Fetherstonhaugh, *K.C.*, and *George R. O'Connor*, for the defendant.

Dec. 9.

THE LORD CHIEF JUSTICE in giving judgment said:—

This case has been very fully spoken to on both sides, and I think I had better proceed to give judgment at once. Now the plaintiff, Mr. Wells, is a money-lender living in England, and Joyce, the defendant, is a farmer living in Connemara, at a place called Leenane. He entered into this transaction, which is the subject of controversy with Mr. Wells. Mr. Wells has a certain number of printed documents. He publishes an advertisement—rather an attractive advertisement—"Cash advanced on note of hand alone without bond, publicity, or charges." In this attractive advertisement he says the money advanced is payable by easy instalments to meet the convenience of the borrower. Mr. Joyce sees this advertisement, I take it, in some local paper, and regards

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Mr. Wells as a person really concerned with his convenience and well-being. That is to say, money was to be advanced and repayable by easy instalments according to his convenience. It was an advertisement very attractive to the rustic mind. Mr. Joyce thought he would write for a loan of £150. There is a printed form dated February 20th, and in this printed form there is this :—"All advances are made in full, and may be repaid by easy instalments extending over a long or short period, or otherwise as may be agreed upon." Another matter very attractive to the somewhat distressed rustic mind! It will be seen that there is not one word in that about a default clause—what I would call the precipitation clause—because if there was default in one instalment, the whole amount secured would become due. The words are "easy instalments," but there is nothing about that important and paramount provision at the end of the note of hand—"Should there be any default," &c. Not a word about that—all easy terms; the well-being and convenience of the borrower were apparently to be regarded with much solicitude, but this clause, by which the money-lender could wind up the borrower with extraordinary rapidity, is not even glanced at in the preliminaries. It is important to see what is in these antecedent advertisements, because they are not only calculated to attract the borrower but to dispose him not to examine with an adequate scrutiny the security he subsequently signs. He is more or less thrown off his guard. It is said that this Joyce could get no money from the bank; that he was in debt; that bank officials would not look at him; and that if he went into a banking establishment in England, and said that he wanted money on his personal security, the police, according to Mr. Bushe, would be sent for. That was one of Mr. Bushe's humorous illustrations. I think any banker, English or Irish, would be slow, indeed, to lend Joyce money; but if he did pursue such a business as this, he would, I think, modify his advertisement, and call the borrower's attention to the provision which enables the lender to swoop down and come before every other creditor. This default clause is all-important—whilst other creditors are slumbering upon their rights—the vigilant, alert, eager money-lender proceeds "hot-foot" for his entire demand, and clears the farm, or insists, as he did in this case, upon exorbitant

interest for a renewal. Mr. Justice Channell, in the case (1) that has been referred to, made some observations which have a bearing upon this case. Referring to the facts of the case before him, he is reported to have said:—"By the terms of the bargain the money was repayable in four monthly instalments, and in the event of any one instalment being unpaid the whole balance of the loan remaining unpaid became payable. The defendant, as he admitted, understood that the principal became due; but he did not understand that if he had failed to pay his first instalment the result would be that instead of paying £50 for the loan of £200 for four months, he would pay £50 for the loan for one month only. That transaction, which was difficult for any one to understand, had the effect of about trebling the rate of interest. Money-lenders, of course, thoroughly understand the effect of that clause which had been their mainstay for many years. In his opinion, a case such as that, where one party thoroughly understood the effect of a bargain, and did not explain the bargain to the other party ignorant of the effect, came within the section." In the present case the defendant was not only ignorant of the rate of interest chargeable when the instalment was not paid, but did not understand the effect of the default clause at all, either in reference to the first note or any subsequent one.

The inception of the transaction should be regarded, for once the borrower gets into the toils of the money-lender it is hard to get disentangled; and if he does for the moment escape from his position of entanglement, he is driven back to it again, as in this case, by the pressure of the amounts he has to pay for interest. The temporary relief afforded by the money-lender to the recipient almost invariably ends in his ruin. The money-lender does not cure; he kills. Now it appeared that Mr. Dickson (the valuer) went down to Connemara, and that he had the money and the note with him—the money! a captivating thing, calculated to hurry matters, and to divert attention from aught else! He did not say a word about that all-important clause—certainly there was no express reference to it; the note was there cut and dry! and the money was tempting, and to be given immediately the note was

(1) *Levene* v. *Greenwood*, 20 *Times* L. R. 389.
L.R. (1906) 1 K.B. 75.

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signed. Joyce says, though he looked through the figures—principal and instalment figures—he did not read or comprehend that portion of the note, "that on default of payment of a single instalment, the whole was to be payable." Now, as to that, there has been a very considerable controversy. It has been said that that statement by Joyce is a falsehood. He has been cross-examined very rigorously. His swearing has been commented on with great energy by Mr. Bushe; but having heard and seen the witness, I am satisfied that Joyce did not understand the effect of the default clause, which is a device on the part of the money-lender to secure an extravagantly excessive rate of interest by shortening the time of the loan—a device which he well knows may, in the urgency of the occasion, no reference having been made to it, escape attention; there was no express specific reference made to it, and I am satisfied that Joyce was ignorant of its effect.

Now, Joyce has been denounced as a man who stated falsehoods. Certainly Joyce did say some things that I did not altogether go with; but having heard and seen him, I am, as I said, of opinion that he did not understand the effect of the default clause, and the state of ignorance of the effect of this clause which existed on Joyce's part in relation to the first note, existed also, in my opinion, in relation to each subsequent transaction. In my judgment, therefore, I think this transaction, even if the case rested here, is an unconscionable one. I think it a harsh and unconscionable transaction. The default clause in the very proceedings before me has been availed of, and it is by reason of its operation that the proceedings have been instituted. The sum charged for interest was undoubtedly excessive; it has been variously estimated, and so difficult was the task to discriminate what was chargeable for interest and what for principal on the note sued on, that the plaintiff's witness failed in the attempt. The note sued on was for £74. No doubt, £24 of this was for interest; but the difficulty was to ascertain how much of the so-called principal—that is to say, £50—was made up of interest, and what effect the default clause had upon the rate of interest. But without going into the precise figures suggested at either side, the amount is clearly excessive. Having regard then to the excessive rate of interest, and to the character of the default

clause, and the circumstances in relation to it, I think that the transaction should be set aside. The matter, however, does not at all end here. The letters given in evidence show the abject position in which Joyce was when signing this last bill. He had feared exposure; the threat of levying execution was held over him; he was pursued by the attorney on the one hand and by the money-lender on the other—a formidable combination! He asked for a renewal. He got a renewal, but what was he charged for it? There was £24 for interest added to the £50. His prostrate condition was unconscionably taken advantage of to coerce him to agree to pay an excessive sum for interest upon interest. On the whole case I am of opinion that the transaction cannot stand. Now, then, what should I do? Taking into consideration the risk run by the money-lender, I will order the payment of the very substantial sum of £40, which Mr. Fetherstonhaugh, on behalf of his client, will, no doubt, consent to pay; and I will direct that sum to be paid by instalments of £20 each. I direct the sum to be paid by two instalments, because I award a larger sum for interest than I should otherwise direct to be paid. In case these respective sums are paid upon the day mentioned, no costs to either side, each party to abide his own costs. And in case the money is not paid on the days named, or either of them, then there will be judgment for whatever part of the £40 remains due to Mr. Bushe's client, with costs. The plaintiff is to have eight days to consider whether he will appeal against this order. When I am apprised as to the course he may resolve to adopt, the formal order can be drawn up.

It will be perceived that I have decided this case independently of the question as to whether an extravagantly excessive rate of interest is of itself—is *per se*—evidence that the transaction was harsh and unconscionable. The Master of the Rolls in England, Sir Richard Henn Collins, is reported to have said, in the case of *In re a Debtor; Ex parte the Debtor* (1), that he did not think that under this section the interest and other charges might not be so excessive as to render the bargain harsh and unconscionable, even as regarded a borrower of full age, and standing in no special

(1) [1903] 1 K. B. 705.

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relation to the lender. This expression of opinion was apparently approved of in a later case, reported in 20 *Times* Law Reports: see Lord Justice Cozens-Hardy's observations in *Wells* v. *Allott*, at page 800. I wish it to be distinctly understood that I say nothing whatever in derogation of the opinion of the Master of the Rolls and Lord Justice Cozens-Hardy; but I decide this case independently of that opinion. It is not necessary to go so far.

On the lapse of the eighth day, the Lord Chief Justice, having been apprised that the plaintiff did not intend to appeal, the following order was signed by him:—

> "THE JUDGE found for the plaintiff, but the said Judge was of opinion that the interest charged by the plaintiff was harsh and unconscionable, and that the defendant was entitled to be relieved from payment of such sum in excess of the sum adjudged by the Court to be fairly due in respect of principal and interest, having regard to the risk and all the circumstances, as the Court adjudges to be reasonable. Whereupon the Judge ordered and adjudged that in lieu of the sum sued for by the plaintiff, defendant do pay to the plaintiff the sum of £40 by the following instalments, that is to say, £20 on or before the 1st day of January, 1905, and £20 on or before the 1st day of March, 1905, without interest; and in the event of such instalments being duly paid, the Judge ordered that each party do abide his own costs, but if default be made in payment of said instalments, or either of them, the plaintiff be at liberty to enter up judgment with costs for said sum of £40, or so much thereof as shall be unpaid at the date when plaintiff so enters up judgment" (1).

Solicitors for the plaintiff: *Monsarrat & Mullan.*
Solicitors for the defendant: *R. J. Connolly & Son.*

J. L.

(1) The Editor and Reporter wish to acknowledge the great assistance they have received from Mr. G. R. O'Connor in preparing this report.

MAGUIRE, APPELLANT; PORTER, RESPONDENT (1).

K. B. Div. 1904. Nov. 3, 10.

Margarine—"Parcel" as distinguished from "package"—Exposing for sale —Label—Margarine Act, 1887 (50 & 51 *Vict. c.* 29), *sect.* 6.

Section 6 of the Margarine Act, 1887, prescribes the following regulations, to be observed by persons dealing in margarine—(1) "Every package, whether open or closed, and containing margarine, shall be branded or durably marked 'margarine' on the top, bottom, and side, in printed capital letters not less than three-quarters of an inch square"; and (2) "And if such margarine be exposed for sale by retail, there shall be attached to each parcel thereof so exposed, and in such manner as to be clearly visible to the purchaser, a label marked in printed capital letters not less than one and a half inches square, 'margarine.'"

On the defendant's counter there was a butt of margarine, from which the lid had been removed, but which was branded on the lid, bottom, and side with the word "margarine." There was no label attached, as required by the second regulation. Defendant's assistant, on being asked for one pound of margarine by the prosecutor, sliced away that quantity from the margarine in the butt, and sold it to him.

The defendant was prosecuted under the second regulation, but the magistrates declined to convict, upon the ground that, upon the acts proved, it had not been violated:—

Held, that the facts brought the defendant within the second regulation, and that the magistrates ought to have convicted the defendant thereunder.

CASE STATED for the opinion of the Court by the Justices of the Borough of Londonderry sitting on the 31st March, 1904.

The charge against the defendant, William J. Porter, was that he, on the 22nd February, 1904, at Rossville-street, in the city of Londonderry, did expose for sale by retail a parcel of margarine to which parcel there was not attached, in a manner clearly visible to the purchaser, a label marked in printed capital letters not less than one and a half inches square, "margarine," whereby he had incurred a penalty not exceeding £20. The magistrates ordered that the case should be dismissed on the merits.

Upon the application of the prosecutor, Edward Maguire, the

(1) Before LORD O'BRIEN, L.C.J., and GIBSON and MADDEN, JJ.

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magistrates agreed to state a case, which they did in the following terms:—

On the hearing of such complaint, the complainant deposed that he went into the shop of the defendant at Rossville-street, in the city of Londonderry, on the 22nd February, 1904, and saw on the counter a butt, which on examination he found branded on the side and bottom with the word "margarine." He purchased one pound, which was taken out of it, from the assistant. Complainant drew the assistant's attention to the fact that there was no label attached as required by the Act; the assistant replied that the label was being washed. On cross-examination, complainant said that the butt containing the margarine was on a box on the counter, and that there was no lid on it.

For the defence William Wilson, defendant's assistant, deposed to the following facts, viz.:—He produced a small round butt, about 14 inches in diameter, and about the same height, and also a lid; this butt was branded on the sides and bottom with the word "margarine," and the lid was also branded in three-quarter inch capital letters, as required by the Act in the case of a package. He further deposed that this was the butt that contained the margarine, and that the butt was set on a bacon box two feet higher than the counter, and that the lid was on the butt. Samuel Smallwood, an assistant in the shop, corroborated this witness's evidence.

And whereas, on the foregoing evidence on behalf of the defendant, the Justices' attention was directed to the words "package" and "parcel" used in section 6 of the Margarine Act, and it was contended that the butt was a package properly branded with the word "margarine" and was not a parcel, and did not therefore require to have the one and a half inch label attached.

For the complainant it was contended that section 6 enacts that there shall be attached to every parcel of margarine exposed for sale by retail a label, and that the margarine in the butt, when exposed for sale by retail, was a parcel, and that a parcel comprised any margarine exposed for sale by retail, and must have a label attached with the word "margarine" in one and a half inch capital letters.

And whereas, upon the said hearing, we the Justices who determined the said matter, being of opinion that the said margarine was contained in a package properly branded as a package with the word "margarine" in three-quarter inch capital letters, and did not therefore require to have a label attached with the word "margarine" in one and a half inch capital letters, gave judgment against the complainant, and dismissed the action on the merits.

And hereupon the judgment of the Court is required as to whether we, the said Justices, were correct in point of law in our determination as aforesaid, or as to what should be done in the premises.

Given under our hands this 19th day of July, 1904.

Then followed the names of the nine Justices who adjudicated.

Osborne and *Henry*, *K.C.*, for the prosecutor.

P. S. Walsh and *Healy*, *K.C.*, for the defendant, referred to *Crane* v. *Lawrence* (1); *Wheat* v. *Brown* (2); *Toler* v. *Bischop* (3).

Nov. 10.

LORD O'BRIEN, L.C.J.:—

This case involves an important question on the construction of the Margarine Act, 1887 (50 & 51 Vict. c. 29), which is entitled, "An Act for the better prevention of the fraudulent sale of margarine." The relevant section is the 6th section of that Act, and the question before us is, Do the facts proved bring the defendant within the scope of that section? Now, the defendant was charged, in the summons which was served upon him, with exposing for sale by retail a parcel of margarine, to which parcel there was not attached, in the manner provided by the Act, a label. That was the offence. The facts of the case may be shortly stated. It appears that the complainant, who was a sergeant in the constabulary, deposed that he went into the shop of the defendant at Rossville-street, in the city of Londonderry, on the 22nd February, 1904, and saw on the counter a butt which, on examination, he found branded on the side and bottom with the word "mar-

(1) 25 Q. B. D. 152. (2) [1892] 1 K. B. 418. (3) 73 L. T. (N. S.) 403.

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Lord O'Brien, L.C.J.

garine." He purchased 1 lb. (one pound), which was taken out of the butt by the assistant. He then drew the assistant's attention to the fact that there was no label attached as required by the Act. The assistant replied that the label was being washed. On cross-examination the complainant said that the butt containing the margarine was on the counter, about eighteen inches higher than the counter, and that there was no lid on it. It was not denied, and it could not be denied, that what was there, whether we are to call it a package of margarine or margarine, was exposed for sale by retail. The magistrates, on the facts, acquitted the accused, holding that there was no offence committed within the 6th section.

The question is, Were the magistrates right in acquitting the accused—were they right in holding that the facts proved were not hit by the 6th section of the Act? I shall read the section of the Act of Parliament. It runs thus:—"Every person dealing in margarine in the manner described in the preceding section shall conform to the following regulations:—Every package, whether open or closed, and containing margarine, shall be branded or durably marked 'margarine' on the top, bottom, and side, in printed capital letters, not less than three-quarters of an inch square." That is the first regulation. The butt was branded in pursuance of this regulation. The summons is founded on the second regulation in the 6th section, which provides: "and if such margarine be exposed for sale by retail, there shall be attached to each parcel thereof so exposed, and in such manner as to be clearly visible to the purchaser, a label marked in printed capital letters not less than 1½ inches square, 'margarine.'" Now, this is the regulation which is alleged by the prosecutor to have been violated. The defendant, on the other hand, says that there is no breach of the regulation, because it deals expressly and exclusively with a parcel and not with a butt or package, that what was exposed here, he contends, using the terms convertibly, was a butt or package, and not a parcel, within the meaning of the Act. Is, then, this contention well founded? Now, what was the scope and object of the statute—what was the plain intention of the Legislature to be collected from the words of the Act? That margarine should not be allowed to masquerade as butter. It will be seen, if

the later Margarine Act is compared with the former, that the legislation on the subject is marked by a progressive stringency. It is conceded that, if there was a quantity of margarine—say some twenty or thirty pounds of margarine—on the counter, or placed immediately above it, exposed for sale by retail in smaller quantities than the bulk which comprised the twenty or thirty pounds, it should have a label attached to it. If this be so, it would surely be unreasonable to hold that, in case of the same bulk being in a butt out of which it was sliced away in smaller quantities, the regulation would not be applicable. What was exposed for sale here was not a package of margarine, but a quantity of margarine, visible to the eye, in a butt from which a portion, viz. one pound, was sliced away in the presence of the prosecutor. In the process of cutting or slicing, the bulk of the margarine must have been seen as well as the one pound that was sold. However, though it is not requisite to go so far in this case, I would be prepared, as at present advised, to hold that if a package of margarine is exposed for sale with the intention of the margarine being sold piecemeal out of the package, that is an exposure for sale within the second regulation.

I am glad to find that what in our opinion should be done is in consonance with the general practice of the defendant. His shop assistant, when challenged as to the absence of a label, said that there was one, but that it was being washed.

The case must go back to the magistrates with a statement of our opinion.

GIBSON, J.:—

Section 6 of the Margarine Act deals with three distinct cases.

1. Every dealer must have every package containing margarine branded or durably marked in three places, "Margarine," in printed capital letters not less than three-quarters of an inch square. This provision is irrespective of sale, or exposure for sale, and contemplates wholesale dealing, or disposition of the entire package.

2. If such margarine is exposed for sale by retail, each parcel thereof so exposed must have attached to it, in such manner as

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to be clearly visible to the purchaser, a label marked in printed capitals not less than one inch and a half square, "Margarine." This clause relates to exposure for sale, irrespective of actual sale.

3. Every person selling margarine by retail, save in a package duly branded or durably marked, must deliver the same to the purchaser in or with a paper wrapper carrying in printed capital letters not less than a quarter inch square the word "Margarine."

This clause refers to an actual sale; the only exception is where the margarine is sold in, not out of, a package. A dealer is required, for the protection of the public, to attach to the parcel exposed for sale a label under clause 2, and also under clause 3 to give the actual purchaser the prescribed paper wrapper. Where the margarine is sold in the original package branded or marked in three places, the third clause does not apply.

In the present case the butt or tub forming the original package was opened, placed on the counter, and exposed for sale, and the margarine was sold from the butt so opened and exposed. It is admitted that if the margarine had been taken out of the butt, placed on the counter, and there exposed for sale by retail, the margarine would have constituted a parcel to which the prescribed label should have been attached. It is also conceded that every piece of margarine sold by retail from such parcel should have been delivered in or with the prescribed wrapper. The question before us is whether the non-removal of part of the original package-envelope prevents the margarine exposed for sale by retail from being a "parcel" within the section. If the entire butt was sold unopened, the purchaser would have the protection of the three brands which could not escape attention. When the butt was opened and placed on the counter for the purpose of selling by retail, the bottom mark would be concealed; the top mark would be removed for the purpose of taking out the portion required for sale, and the side mark, by shifting the side of the butt, might be rendered invisible. A butt opened and exposed for sale could not be considered as an original package; bulk was broken, and the margarine contained in the open butt became a "parcel." Any other interpretation of the word "parcel" would

enable the dealer to evade and nullify the statutory safeguards by retailing margarine out of the original tub or butt, instead of removing it from such butt, and the marks, useful if the entire package was sold, would be valueless for the protection of the buyer of part by retail. I have no doubt that the decision below was wrong. I offer no opinion whether an unopened package, exposed for retail sale on the counter, would be or would not be a parcel. The sale of such package would certainly not fall within clause 3. That is by no means decisive; but the circumstance that the purchaser of the entire package would have the protection of all three marks makes such a sale very different from sale out of an opened package. The present decision introduces no novelty into the practice of dealers, as it appears that a label was used, but had been temporarily removed.

MADDEN, J.:—

The margarine in the case before us was clearly exposed for sale by retail. It was contained when so exposed in a butt from which the cover had been removed, and which was placed on the defendant's counter. Was the margarine so exposed a "parcel" of margarine within the 6th section of the Act of 1887? If so, the statute has been violated, for the margarine had not attached to it the required label. No doubt the word "parcel" in ordinary usage conveys the idea of something enclosed in a wrapper. But this is not the original meaning of the word, which obtains in many legal phrases, such as "part and parcel," and the "parcels" of a conveyance. Here the word is clearly synonymous with "portion." The mischief against which the sub-section is directed is the sale of margarine by retail as butter, or so as to be mistakable for butter. This policy could only be effected by attaching to each portion or parcel of margarine exposed for sale a label clearly stating the nature of the substance offered to the purchaser.

Solicitor for the prosecutor: *Sir F. H. Miller.*
Solicitor for the defendant: *T. C. Wylie.*

J. L.

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1904.
June 16, 17.

THE KING (SHANNON) *v.* HOLYWOOD URBAN DISTRICT COUNCIL (1).

Local government—Urban District Council—Poor rate—Demand note of County Council, giving credit for a certain sum, and demanding balance—Resolution of Urban District Council, allocating sum credited in relief of taxation for next five years—Illegality of poor rate struck on this basis—Power of Urban District Council to strike poor rate in one financial year to meet demands payable at the beginning of the next financial year—Right of ratepayers to inspect estimate of poor rate—Local Government (Ireland) Act, 1898, *sects.* 46 (1), 51 (6)—Certiorari—*Costs of successful prosecutor.*

A County Council, by its demand note, demanded a certain sum from an Urban District Council, the amount being arrived at after giving credit to the Urban District Council for a sum of about £300, the balance standing to the credit of the Urban District Council in the hands of the County Council at the close of the preceding financial year, arising from an adjustment of accounts between the County Council and the Urban District Council consequent upon a Provisional Order altering their financial relations. The Urban District Council resolved that £60 per annum of this sum of £300 so credited should be allocated towards reduction of the rates during the next five years, and struck the poor rate for the ensuing year on this basis :—

Held, that the Urban District Council had acted illegally in spreading over five years a sum which should have been applied immediately in relief of the ratepayers, and that the rate was bad.

An Urban District Council, in striking a poor rate, is not limited to striking a rate sufficient to raise the amount demanded by the County Council and the costs of collection. A rate may be struck sufficient to raise, in addition, a sum which will enable the Council to have in hand sufficient to meet its liability in respect of demands which will be payable at the commencement of the next financial year at a time when it will not be possible to obtain money under the taxing powers for that year.

Ratepayers have a right to inspect the estimate prepared by the clerk of an Urban District Council for the purpose of making poor rate.

The King's Bench Division in Ireland can give costs in *certiorari* proceedings of a civil nature to a successful prosecutor. The reason of the distinction in this respect between the powers of the English and the Irish Courts explained.

(1) Before Palles, C.B., and Johnson and Madden, JJ.

CERTIORARI.

This was an application on behalf of the prosecutor to make absolute a conditional order for a writ of certiorari to remove, for the purpose of being quashed, all assessments or rates and resolutions of or made by the Holywood Urban District Council on the 14th and 15th March, and 8th of April, 1904, respectively, and the proceedings of the council in pursuance thereof, so far as they related to the making of a poor rate of 1*s.* 11*d.* in the £ for the year ending 31st March, 1905, and to the allowance of a sum of £60 each year for five years instead of a sum of £295 19*s.* 8*d.* for the year ending 31st March, 1905, in reduction of the poor rate account, on the grounds (*inter alia*) that same were bad, illegal, and made without and in excess of jurisdiction; that the rate struck was excessive, in so far as it was struck to raise any greater sum than the sum of £1065 8*s.* demanded by the County Council, plus a sum of about £50 for collector's poundage and costs; that in fixing the rate necessary to be struck to meet the said demand, the council failed to take into consideration the fact that they had in hand a sum of £530 credit balance on the poor rate account which was applicable, and should have been applied, in reduction of the County Council demand; that the rate struck was illegal *ex facie*—(1) because it was based upon the gross demand of the County Council, instead of the net demand; (2) because it provided for an unnecessary surplus balance of £210; that as regards the resolution of 14th March, 1904, the Urban Council, having got credit from the County Council of Down for the entire sum of £298 12*s.* 8*d.* due to them on the re-adjustment of the financial relations between the two councils, were bound to allocate the whole of the said sum in reduction of the poor rate for the year ending 31st March, 1905, and could not spread the said reduction over a period of five years.

The County Council of Co. Down, on the 25th February, 1904, had served on the Urban District Council of Holywood a demand note requiring payment from the Urban District Council of a net sum of £1065 8*s.*, in respect of the estimated expenditure for the ensuing financial year ending 31st March, 1905, and demanding that this sum should be supplied by transferring, at the first meeting of the Urban District Council in each quarter of the

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financial year, to the credit of the county fund, one-fourth part of the amount so demanded. The table annexed to the demand note set out the gross sum estimated as payable by the Urban District Council for the year in question as £1424 16*s.* 2*d.*, viz. for County Council charges £759 15*s.*, for union charges £660 11*s.* 8*d.*, and for general charges £4 9*s.* 6*d.*; but as against this gross sum credit was given for £359 8*s.* 2*d.*, described as balance in favour of urban district at close of preceding financial year. It appeared that this sum of £359 8*s.* 2*d.* for which credit was given was made up of two sums, viz. £295 19*s.* 8*d.*, to which the Holywood Urban District Council was entitled on the adjustment of accounts between the County of Down and the urban districts in the county, consequent on the provisional order altering the financial relations between the urban districts and the county; and a further sum of £63 8*s.* 6*d.*, a surplus balance to the credit of the Holywood Urban District Council from the previous year.

At a meeting of the Holywood Urban District Council, held on the 14th March, 1904, it was resolved by a majority of the members present that £60 per annum of the above-mentioned sum of £295 19*s.* 8*d.* should be allocated towards the reduction of the rates during the next five years.

At a meeting of the Finance and General Purposes Committee of the Urban District Council, held on the 15th March, 1904, the clerk submitted his estimate of rates for the ensuing year, and it was decided to strike a poor rate at the rate of 1*s.* 11*d.* in the £. This rate was adopted by resolution of the Urban District Council, passed by a majority of the members, at their monthly meeting held on the 8th April, 1904.

The estimate submitted by the clerk of the Urban District Council, in so far as it dealt with poor rate, set out under the head of estimated receipts:—Balance at close of year ending 31st March, 1904, £530; poor rate at 1*s.* 11*d.* in the pound, £1150, making in all £1680. Under the head of estimated expenditure was set out:—County charges, £764; union charges, £661; collector's poundage and cost of printing and preparation of rate-books, £45; estimated surplus balance at 31st March, 1905, £210.

In an affidavit made by the prosecutor (a ratepayer in the Holywood Urban District) it was contended that the expenditure

in respect of county charges and union charges should have been estimated at only £1065 8*s.* (the net amount of the County Council's demand), together with the item for collector's poundage, &c. That against this there should have been set off the credit balance of £530 from the previous year, leaving a total sum to be provided of less than £600, which could have been raised by a poor rate of 1*s.* in the £.

In affidavits filed on behalf of the Urban District Council, it was stated that the estimated balance of £530 at the close of the year ending the 31st March, 1904, was made up of the sum of £406 11*s.* 6*d.*, moneys in the hands of the treasurer; the sum of £63 8*s.* 6*d.*, balance overestimated by the County Council for the year ending 31st March, 1904; and the sum of £60, portion of the sum of £295 19*s.* 8*d.*, due to the Urban District Council on the adjustment of accounts as above mentioned. That under the Local Government Act and Orders and Forms made thereunder, the Urban District Council have to comply with the demand of the County Council at the times and in the manner specified therein, and have, therefore, to pay the amounts of the demand by transferring, at the first meeting of the Urban District Council to be held in each quarter of the financial year, one-fourth part of the sum demanded. That the first meeting of the Holywood Urban District Council, in the first quarter of each financial year, was held about the 8th of April, and the first meeting in the second quarter was held about the first week in July. That after the receipt of the County Council demand in each year, the Urban District Council have to make their rates, which have to be published for one month, and subsequently demand notes for the rates have to be settled and served, and the rates then to be collected, and that it was absolutely impossible for the Urban District Council to meet the demands of the County Council at the time and in the manner specified, unless the Urban District Council had, at the end of each financial year, money lying to their credit applicable to the demand of the County Council. That the Urban District Council, since the passing of the Local Government Act, had in their estimate of the sums required made reasonable provision for the fact that they would have to pay the first two quarterly instalments of the demand of the

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County Council for the ensuing year, before any substantial portion of the rates for that year was paid, or could be collected by the Urban District Council. That the balance of £406 11*s.* 6*d.* in the hands of the treasurer at the close of the year ending the 31st March, 1904, together with the sum of £1150, the amount estimated to be raised by poor rate at 1*s.* 11*d.* in the £ (making in all £1556 11*s.* 6*d.*), was the only money which would be in the hands of the treasurer of the Urban District Council applicable to the payment of the demands of the County Council, until the Urban District Council made, levied, and collected the poor rate for the year from 1st April, 1905, to 31st March, 1906, and that at the lowest calculation there would have to be paid thereout the sum of £1065 8*s.*, the net demand of the County Council for the present year, and almost the entire of the first two quarterly instalments of the County Council demand for the year from 1st April, 1905, to 31st March, 1906, which, on the average, amounted to over £700. That if the whole of the above-mentioned sum of £295 19*s.* 8*d.* had been included in the estimate, the only difference would have been that the estimated surplus balance in the hands of the treasurer of the Urban District Council in respect of poor rate at 31st March, 1905, would have been £445 19*s.* 8*d.*, instead of £210 as shown in the estimate. That after deducting the costs of collection, the actual balance in the hands of the treasurer on the 31st March, 1905, would be a little over £400, a sum similar to the balance in the hands of the treasurer at the end of the previous financial year. That, from a business point of view, the resolution of the 14th March, 1904, was immaterial, for the County Council had applied the whole of the refund of £359 8*s.* 2*d.* to the present year, and whether the clerk took the whole or only £123 8*s.* 6*d.* thereof into credit in his estimate, the treasurer would, as a matter of fact, have at the end of the present financial year a sum of £400 odd, raised by means of poor rate, and applicable to payment of the demands of the County Council, and that the Urban District Council knew this when the rate in question was made.

Healy, K.C. (with him *F. Redmond* and *J. Whitaker*), for the prosecutor:—

The rate is bad. The Holywood Urban District Council

were bound to apply the whole of the sum credited by the County Council in relief of the taxation for the ensuing year, and to strike a rate merely sufficient to meet the net sum demanded by the County Council, with the costs of collection. Instead of that, the estimated expenditure in respect of county and union charges is set out in the clerk's estimate as £764 and £661, respectively, making together £1425, that is to say, the gross and not the net amount of the County Council's demand. It is alleged on the part of the Urban District Council that the sum of £530, set out in the estimate as the balance from the last year, includes the two sums of £63 8*s.* 6*d.* and £60. No one, from reading the estimate, could ascertain this; but even assuming it to be the case, the rate struck is excessive. The whole of the refund of £295 19*s.* 8*d.* should have been credited to the ensuing year, but instead of that the District Council resolved that it should be spread over the next five years, and that only £60 of it should be applied in reduction of taxation for the ensuing year. The poor rate was struck on that basis, and we submit it is illegal. We contend that the Urban District Council have no power to strike a rate to raise more than will be sufficient to meet the net demand of the County Council, viz. £1065 8*s.*, with the costs of collection: Local Government (Ireland) Act, 1898, sect. 51, sub-sect. 6; sect. 47, sub-sect. 2. There is no power to do what the District Council, on their own showing, have done here, viz., to strike a rate with a view to providing for sums payable in respect of the financial year commencing on the 1st April, 1905. As to the contention put forward on behalf of the Urban District Council, that it would be impossible to comply with the demands of the County Council as respects the first two quarterly instalments, the difficulty could be met by arranging to have the quarterly meetings of the Urban District Council fixed at a later date than at present. [He referred to *Reg.* (*Nelson*) v. *Sligo Corporation* (1); *County Council of Wicklow* v. *Bray Urban Council* (2).]

Henry, K.C., and *D. M. Wilson*, for the Holywood Urban District Council:—

If the contention of the prosecutor is right, it would be impos-

(1) 35 I. L. T. R. 35. (2) 3 New Ir. Jur. R. 160.

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sible to carry out the provisions of the Local Government Act. The Urban District Council have no power to borrow or to obtain an overdraft at their bank, and, therefore, cannot comply with the demand of the County Council, as regards the payments to be made in the first two quarters of the financial year, unless they arrange to have a balance over from the previous year sufficient to pay the whole of the instalment payable at the first meeting in the first quarter, and the bulk of the instalment payable at the first meeting in the second quarter; all that was really done in the present case was to provide for such a balance. We submit that there was power to do this. Section 46, sub-sect. 1, of the Local Government (Ireland) Act, 1898, merely provides that the expenses of the Urban District Council incurred in meeting the demands of the County Council shall be defrayed out of poor rate, not that the poor rate is to be limited to the amount of such demands. There is no provision that an Urban District Council shall not raise more than the amount demanded. By sections 28 and 72 of the Local Government Act, the business and powers of the Poor Law Guardians as regards making and levying rates are transferred to the Urban District Council. Under section 61 of 1 & 2 Vict. c. 56, the Guardians were given power from time to time to make and levy such rates as might be necessary. The word "service" in section 51, sub-sect. 6, of the Local Government Act should be given an elastic interpretation. It is part of the service of each six months to provide that the Urban District Council shall be in a solvent condition and able to pay its debts. The other questions raised are mere matters of book-keeping. The ratepayers have no right to inspect the estimate. By section 21 of 12 & 13 Vict. c. 105, the rate books are to be open to the inspection of the ratepayers, but there is no such provision as regards the estimate. [*Redmond* referred to Article 19 (4) of the schedule to the Local Government (Application of Enactments) Order, 1898.] There is no provision making the estimate part of the poor rate, or making an estimate necessary for striking poor rate, in the case of an Urban District Council. An estimate for poor rate is only provided for in the case of a County Council: County Councils Order, 1899, Article 23 (1). The resolution of the 14th March, 1904, has really no effect; all the moneys will be

in the hands of the treasurer, and all such moneys, including the whole of the sum of £295 19*s.* 8*d.*, will be applied by him in payment of the demands payable in the present year and the early part of the next. The surplus of about £400 which will remain at the end of the present financial year is not excessive, having regard to the facts mentioned in the affidavits, and will be practically the same as the surplus from the previous year. The Court, therefore, ought not to grant the *certiorari*, since, even if this rate was quashed, a perfectly good rate of the same amount could be made the next day. [They referred to *The Queen* v. *The Guardians of Omagh Union* (1).]

Redmond, in reply.

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June 17.

By their demand note the County Council gave credit to the Urban District Council for a sum of £359 8*s.* 2*d.*, as against a gross sum of £1424 16*s.* 2*d.*, and *demanded* the difference, £1065 8*s.* It is evident that in estimating the sums required to be raised by the rate, the balance of £1065, and this sum only, should have been treated as the amount of the demand, and that a rate calculated on the basis that the two sums of £764 and £661 (making together £1425), and not £1065, were payable in respect of that demand, was excessive. The calculation which led to the making of the illegal rate was not one made *per incuriam*; on the contrary, the Urban District Council on the 14th of March, 1904, passed a resolution that £60 per annum of a sum £295 19*s.* 8*d.*, portion of the credit of £359 8*s.* 2*d.*, should be allocated towards the reduction of the rates during each of the next five years. That is to say, they thought they had authority to spread the sum credited by the County Council over five years, and therefore to raise in the current year, 1904, a sum of practically £236 more than they had any authority to raise. Accordingly, they proceeded to strike a rate for the purpose of raising that sum of £236 in excess of what was really due, and they did so upon a wrong construction of the Local Government Act. In doing that they acted illegally

(1) 26 L. R. Ir. 619.

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They had power to raise a rate to pay *inter alia* a certain specified sum; they struck their rate for the purpose of raising that sum and £236 more *as if it were part of it*, and in my view, for that reason alone, the rate was illegal. They assumed to themselves and usurped a jurisdiction to determine in what way this sum of £295 19*s.* 8*d.* should be applied for the relief of the ratepayers, and instead of applying it to relieve the ratepayers of the current year, they resolved to apply only one-fifth of it for that purpose, and to apply the residue to relieve ratepayers in subsequent years. Therefore, on that ground alone, and without going into the matter so much argued as to the estimate, I am of opinion that the rate is bad, and should be quashed.

But, I confess, I am also of opinion that the prosecutor here is entitled to go into this question of the estimate for the purpose of showing what was the sum which the rate was struck to raise; and the moment we go into the estimate, the irregularity and illegality appear to me to be increasing step by step.

The sums for payment of which the Urban District Council intended to raise the rate, are sums of £764 and £661, instead of a sum of £1065; and when we pressed their counsel as to why they sought to raise these two sums, we were told that although that may have been an error, there was a compensating error on the other side. When we look at the other side, we find the sum that is put down as balance at the close of the year is £530. It is alleged by the Urban District Council that that includes a sum of £60, part of the sum in dispute, and also includes a sum of £63 in the hands of the County Council. These alleged errors do not make the case better for the Urban Council. Even were they taken into account, the estimate would be for £236 in excess of the sum for which the rate ought to have been struck. But I decline to go into this matter of compensating errors. The ratepayers have a right to look at all these documents. Even were it not necessary that the Urban District Council should have had a written estimate, when such an estimate did exist, it should have been entered on the minutes, and should have been open to the inspection of the ratepayers. In the present case it would require the assistance of a chartered accountant, and, in addition, the explanation given here by counsel, to ascertain what really was

meant by this account, or to arrive at any other conclusion than that many of the items were almost fictitious.

I am of opinion that the *certiorari* should go, on the ground that the resolution of the 14th March, 1904, shows that the sum to raise which this rate was struck was, in consequence of a wrong construction of the Act of Parliament, a substantially larger sum than that which ought to have been raised; but I wish to say a word as to one of the grounds, the most important, on which the rule was moved. Section 46 of the Local Government Act deals with two different sums to be defrayed out of the poor rate—the amount of the demand note, and the expense of making the rate. And the argument here is that the Urban District Council cannot make a rate for the purpose of raising any greater sum than the amount of the demand note, and the costs of collection. I do not agree in that view, which I consider would render unworkable the business of all the Urban District Councils in Ireland. The practical result would be that the rating authority would not be in a position to comply with the Act of Parliament by paying to the County Council the apportioned part of the County Council's demand for the next financial year, *i.e.* 1905–6, which ought to be paid at the first meeting of the District Council in the first quarter of that year. We have to see are we driven to a construction which would lead to such a result.

I should say, in the first place, that by the 28th section of the Local Government Act there is transferred to the Urban District Council the power of making the poor rate, and that power is given by section 61 of the 1 & 2 Vict. c. 56, "to make and levy such rates *as may be necessary.*" A larger power cannot be found in any statute. I cannot leave out of consideration that so strong in former times was the view of the law in reference to sums to be raised for the relief of the poor, that there was a time in England when the Courts made an exception of poor rate from all other rates, and refused to quash a poor rate no matter how illegal it might be, and so refused on the express ground that if they did so there would be no money for the support of the poor. That has never been the law in Ireland, and I mention it merely for the purpose of showing how astute the law ought to be not to cramp the hands of the authority which is to

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raise the poor rate, so as to leave the poor law authorities without funds to support the poor. Mr. Redmond argues that this reason does not apply here, because the obligation is on the County Council to provide the necessary sums for the relief of the poor, and they are to be recouped by the rate we are dealing with here. That is not strictly accurate. The duty of the District Urban Council is to provide the money before it is expended, not to recoup it after expenditure. But even were the duty only to recoup, if the various authorities that are to recoup the County Council are not able to do so in due time by reason of the construction we put upon the Act of Parliament, then the County Council itself would not have the money to apply to the relief of the poor, and in the result the poor would suffer.

I am, therefore, to take as liberal a view as I can of the section, having regard to the principle I have mentioned, and the purposes to which these rates are to be applied. I start with this. There is a power to levy such rates as may be necessary for the purpose of paying their proportion towards the support of workhouses, which are to be continuing institutions and supported as going concerns. If then there is such a restrictive construction as will prevent the Urban District Council from having in hand money sufficient for that purpose until they can raise the next succeeding rate in the next succeeding half-year or year, then that restrictive construction prevents the Council from doing the duty thrown upon them by the statute.

The argument in favour of such restrictive construction is based on sect. 51 (6) of the Local Government Act, 1898, which provides:—"Such poor rate shall be made either immediately prior to, or at the beginning of, the first six months of the local financial year, and the second six months of that year, and shall be made *in respect of the service of such first* six months, or second six months, as the case may be."

I look upon the word "service" as meaning the service of a continuing institution, and when the Legislature gives a power to make such rates as may be necessary for the purpose of working that institution as a going concern, and then say that they shall

have power to make a rate in respect of the services of the first six months of the year, I cannot think that the Council are not at liberty to do what any prudent body would do, viz. to provide during one year for the sums which will be payable at the commencement of the next year at a time when it will not have been possible to obtain money under the taxing powers for that year. I do not find any negative words in sect. 51, sub-sect. 6. The words are affirmative.

I mention this matter in order that it may not be conceived by any of these local taxing bodies in Ireland that they are placed in this difficulty. If we arrived at any other conclusion, an Act of Parliament would be necessary to amend the Local Government Act, as it would be impossible for the County and District Urban Councils to perform their statutable duties effectively were the suggested restricted construction the true one.

For the reasons I previously mentioned, we think that the *certiorari* ought to go. We also think there is no reason why the prosecutor should not get the costs of the proceedings.

I should here mention that this Court has jurisdiction, although the King's Bench Division in England has not, to give costs to a successful prosecutor in proceedings for *certiorari* in civil matters. As to criminal matters it is not necessary that, in the present case, I should say anything. The difficulty in England arose from the decision of the Court of Appeal in *In re Mills' Estate* (1), in which it was held that under the English Judicature Act of 1873, the Supreme Court had not power to make rules in relation to costs in any case in which, before that Act, there was no power to give costs. If the judgments in that case are examined, they will be found to be based on this. The provision in reference to costs being in the discretion of the Court was not introduced into the English Judicature Act, it was contained in the rules made under the Act. In *Mills' Estate* (1) it was held that the rules (although afterwards confirmed by statute) should be construed in such a way as to be at the time they were made within the power of the Court that made them; and as the Court had no power to give costs, where costs could not have been given before that Act,

(1) 34 Ch. D. 24.

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that the rule in question should be restricted by construction to cases in which costs could have been so given. But before the Judicature Act, costs could not have been given to a prosecutor in *certiorari: Reg.* v. *Parlby* (1). An amending Act, the Judicature Act, 1890, by sect. 5, gave the Court a discretion as to costs in all proceedings in the Supreme Court, but unfortunately the Act contained another section (sect. 4) which provided that nothing in the Act should alter the practice in any criminal cause or matter, or in bankruptcy, or "*in proceedings on the Crown side of the Queen's Bench Division*," and, therefore, the extending section did not apply to cases of *certiorari* which were, in their nature, proceedings on the Crown side of the Queen's Bench Division: see *London County Council* v. *Churchwardens of West Ham* (2); although it was held to apply to proceedings in *habeas corpus*, as they could have been taken in any of the Divisions: *The Queen* v. *Jones* (3).

In Ireland the case is different, because the provision as to costs was embodied in our Judicature Act of 1877 (see the 53rd section), and under that statute the Judges here acquired jurisdiction (subject to the restrictions in the Act) as to costs in all proceedings; whether before the Act there was or was not power to give costs in such proceedings.

JOHNSON and MADDEN, JJ., concurred.

Rule for a certiorari absolute with costs.

Solicitors for the prosecutor: *Glass & M'Kane.*

Solicitors for the Holywood Urban District Council: *M'Lean, Son, & M'Kisack.*

J. G. T.

(1) 6 *Times* L. R. 36; W. N. 1889, p. 190. (2) [1892] 2 Q. B. 173.
(3) [1894] 2 Q. B. 382.

KENEALY *v.* THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF KILKENNY (1).

(1901. No. 6754.)

K. B. Div. 1903. Feb. 28. *Appeal.* June 4.

*Local government—Employer and servant—Town clerk—Dismissal of—Misconduct—Incapacity—Compensation—*61 *&* 62 *Vict. c.* 37, *sect.* 115, *subsect.* 19, *sect.* 116.

In resisting a claim by a town clerk, or clerk to commissioners of a town, for a superannuation allowance or gratuity, under sect. 116 of the Local Government (Ireland) Act, 1898 (2), it is open to the borough or commissioners to rely upon an act of misconduct, as justifying dismissal, other than that for which they purported to dismiss the claimant.

Wilful disobedience of the reasonable orders of his employers amounts to misconduct warranting the dismissal of a town clerk, and disentitles him to a superannuation allowance or gratuity under section 116, *supra*.

NEW TRIAL MOTION.

The action, which was tried before Mr. Justice Andrews, and a special jury of the city of Dublin, during the Michaelmas Sittings, 1902, was brought by the plaintiff against the mayor, aldermen, and burgesses of the borough of Kilkenny; the substance of the plaintiff's claim being that he was appointed town clerk of the city of Kilkenny on the 2nd May, 1887, and

(1) In the King's Bench Division, before LORD O'BRIEN, L.C.J., and MADDEN, BOYD, and KENNY, JJ.

(2) 61 & 62 Vict. c. 37, sect. 116:—"If any existing town clerk of a borough, or clerk to the commissioners of any town, is removed from his office for any cause other than misconduct or incapacity, he shall, without prejudice to any existing right, be entitled to receive from the council of such borough or district, if he is qualified for a superannuation allowance under the Local Officers Superannuation (Ireland) Act, 1869, a superannuation allowance on the scale provided by the Acts and Rules relating to Her Majesty's Civil Service; and if he is not so qualified, a gratuity according to the scale in Part I. of the Seventh Schedule to this Act; and the amount of any such allowance or gratuity shall, in case of dispute, be determined by the Treasury. . . ."

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held that office until the 7th of May, 1900, when he was removed therefrom by the defendants for some cause, as he alleged, other than misconduct or incapacity, whereupon his said office was abolished, and he claimed that having been an existing officer when the Local Government (Ireland) Act, 1898, came into operation within the urban district of the city of Kilkenny, he became entitled to receive from the defendants the sum of £857 2*s.* 8*d.*, compensation by way of superannuation allowance or a gratuity, but the defendants had refused to recognise any right on his part thereto, alleging that they had dismissed him on the ground of misconduct, and that the Lords of the Treasury to whom he had applied had stated that they were advised that they had no jurisdiction to decide whether a town clerk had been properly dismissed, and were therefore unable to take any action.

The plaintiff relied on section 115, sub-sect. 19, of the Local Government (Ireland) Act, 1898, section 120 of part II. of the 7th schedule thereto, and section 116 of the said Act, and also pleaded an alternative claim for wrongful dismissal by the defendants without reasonable notice.

The defendants in their defence alleged misconduct and incapacity on the plaintiff's part in respect of his duties as town clerk, and that they, therefore, dismissed him. The following short summary of the evidence is taken from the report of the learned judge at the trial. The further facts of the case will appear fully in the judgments.

The plaintiff was appointed town clerk of the city of Kilkenny on the 2nd May, 1887, at a salary of £100 per annum, with further emoluments, viz. £50 per annum for acting as the mayor's secretary, and a sum averaging between £40 and £50 per annum paid to him by the Grand Jury for preparing voters' lists.

In the year 1889 a Provisional Order was obtained by the defendants from the Board of Trade in respect of a scheme for the supplying of electric light to the city of Kilkenny. This scheme was deferred owing to the necessity of providing a water supply for the city, and four letters, dated respectively 5th November, 1898, 6th and 30th May, and 21st July, 1899, were addressed by the Board of Trade to the plaintiff, warning the defendants that the Provisional Order would be cancelled unless the scheme was

proceeded with. None of these letters were brought under the notice of the defendants, the plaintiff subsequently alleging that they had not been received by him. A fifth letter, dated 4th August, 1899, was addressed by the Board of Trade to the plaintiff, notifying to the defendants that the Provisional Order had been cancelled, and this letter was not laid before the defendants until the month of September, 1899. The plaintiff alleged that this letter had been mislaid and found accidentally by him unopened. A committee of the defendants was appointed to enquire into the matter of the letters; and in consequence of their report, the plaintiff was, by a resolution of 16th October, 1899, dismissed from his office of town clerk. By a second resolution of the same date, the plaintiff was required within a week to deliver up all books, documents, and property belonging to the defendants, which the plaintiff refused to do, and a *mandamus* was subsequently granted to the defendants to compel the plaintiff to comply with the said resolution.

The resolution of the 16th October, dismissing the plaintiff, was not acted upon, owing to some doubts as to its validity; and on 7th May, 1900, a second resolution was passed, dismissing the plaintiff on the ground of misconduct and incapacity.

The defendants gave evidence as to the following, amongst other, alleged instances of misconduct and incapacity. By a resolution of the defendants of 6th February, 1899, all articles required by the defendants were to be entered in certain books, and a copy of the order was to be furnished to all the officials interested. By a second resolution of the same date the plaintiff was required to attend and keep the minutes of certain weekly meetings of the defendants, and by a third resolution of the same date the plaintiff was required to return a statement of the salary and emoluments of his position as town clerk. The plaintiff, as alleged by the defendants, failed to comply with any of these resolutions.

At the close of the plaintiff's case, counsel for the defendants asked that a verdict should be entered for them upon the following grounds:—

1. That the action for wrongful dismissal was not competent

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to a plaintiff who held his employment at the mere pleasure of the defendants: 3 & 4 Vict. c. 108, s. 93.

2. That so far as the statement of claim sought relief by way of compensation under the Local Government (Ireland) Act, 1898, such relief could not be given by way of action at law, and that no jury was competent to assess same.

3. That the action for wrongful dismissal did not lie, because a special provision was made by statute in the premises whereby a dismissed town clerk was entitled to pension or gratuity by way of compensation for his loss of office, and a remedy by action at law could not be cumulative thereupon.

The learned judge declined to direct.

The following were the questions submitted to the jury, with the answers thereto:—

1. Was there misconduct on the part of the plaintiff, as town clerk, prior to his dismissal on the 7th of May, 1900—(*a*) By wilfully disobeying the reasonable orders of the defendants given to him in the course of his service in the said office? *Answer*—Yes. (*b*) By repeatedly and grossly neglecting his duties in the said office, and failing to perform them? *Answer*—No. (*c*) By conducting himself in an improper, offensive, and disobedient manner in the discharge of his said duties? *Answer*—No. (*d*) By taking away from the public offices of the Corporation records and other property of the Corporation, and detaining the same? *Answer*—Yes; only detaining.

2. Was there incapacity on the part of the plaintiff, as town clerk, in not having been reasonably competent to perform the service and duties of his office? *Answer*—No.

3. Was the plaintiff removed from his office of town clerk for alleged misconduct or incapacity. *Answer*—Yes.

4. Was there misconduct or incapacity on the part of the plaintiff as charged in the report of the committee of the defendants? *Answer*—Neglect, so far as the letter of 4th August only.

5. If you find on the fourth question in the affirmative:—Were the acts or omissions charged in the report condoned by the defendants prior to the 7th May, 1900? *Answer*—Yes.

6. Had the defendants reasonable grounds for believing that the plaintiff received the four letters from the Board of Trade in

due course; and did not produce them before any meeting of the Council? *Answer*—Yes.

The learned judge refused to enter a verdict for either the plaintiff or the defendants on these findings, and the plaintiff now moved for an order that pursuant to the findings of the jury a verdict and judgment should be entered for him for the sum of £857 2*s.* 8*d.*, or, in the alternative, for such sum as should subsequently be determined by the Lords of the Treasury, or, in the alternative, for a new trial.

Samuels, K.C., Healy, K.C., and *M. B. Cooper*, for the plaintiff.

Bushe, K.C., Cherry, K.C., and *Clancy*, for the defendants.

Cur. adv. vult.

LORD O'BRIEN, L.C.J.:—

This case has been very fully argued before us; the argument occupied several days, but in the end it resolved itself into the consideration of comparatively few factors, and these few factors enable us to give judgment in the case. It is a somewhat painful case; the plaintiff and the Corporation of Kilkenny, the defendants, seem for a long time to have been in a state of acute antagonism, and the result is the present action.

The plaintiff brings the action against the Kilkenny Corporation who have dismissed him, founded upon the 116th section of the Local Government (Ireland) Act, and also for wrongful dismissal. He says that he was town clerk of the Kilkenny Corporation, that they dismissed him, and that he is entitled to a superannuation allowance or gratuity under the 116th section of the Act. The Corporation says, "No, you are not entitled to any gratuity or superannuation allowance under that Act, because you were dismissed for misconduct, and misconduct excludes all right to a gratuity, or other claim for relief." The plaintiff says, in reply to that, "The only misconduct you alleged was the suppression of certain letters which you say I received and did not bring before the Corporation, and the jury have acquitted me of all blame in respect of these letters, and, therefore, I stand dismissed subject to no imputation of misconduct or incapacity, and am entitled to succeed in this action."

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Well, it is true that the jury have acquitted the plaintiff of all blame in respect of these letters. There were five letters in all; four of them they acquitted him of suppressing, and his action in reference to the fifth is included in a certain finding of condonation; so as regards the ground of dismissal, he says, "I stand acquitted, and must get my gratuity." The Corporation say—"Notwithstanding the finding of the jury, you are guilty of misconduct in other ways; and although we dismissed you for misconduct in reference to the letters, we can now insist upon the other grounds of misconduct, and assert that these other grounds of misconduct deprive you of all right to either superannuation allowance or gratuity."

The jury did find other grounds of misconduct, and a question—to which I shall apply myself later on—arises as to whether these were condoned; but Mr. Samuels and Mr. Healy argue that so far as the action is conversant with the claim under the 116th section, they are entitled to succeed, that the plaintiff was dismissed from his office for a cause other than misconduct, because the alleged ground of misconduct was negatived, and that he is entitled to recover his gratuity—that in fact the Corporation cannot rely upon other grounds of misconduct at all. They rely on the opening provisions of the 116th section, which are as follows:—"If any existing town clerk of a borough or clerk to the commissioners of any town is removed from his office for any cause other than misconduct or incapacity, he shall, without prejudice to any existing right, be entitled to receive from the council of such borough or district . . . a superannuation allowance . . . ." What is the meaning of these words? No doubt the section is somewhat awkwardly worded, but what is the meaning? The meaning clearly is, in my judgment, that if the town clerk was guilty of misconduct or was incapable he is not entitled to anything; that misconduct or incapacity debarred him from all right to superannuation allowance or gratuity. Now, I put this case to Mr. Samuels early in the argument—"Suppose they dismissed him for something that was misconduct of a not very aggravated character, and the alleged ground of dismissal failed, and they discovered some serious fraud which in fact he was guilty of, would such a man be entitled to recover as against the Corporation?" It would be a public scandal if he were. Not that for a moment I impute to

Mr. Kenealy any fraud; I only put a hypothetical case with a view to ascertaining the meaning of the Act of Parliament. I put this case to Mr. Samuels—"Supposing they discharged him from his office for some act of misconduct not of a very pronounced character, and afterwards discovered that he was guilty of falsification of accounts, is he to be entitled nevertheless to recover a gratuity? Mr. Samuels admitted that he is not; and Mr. Healy admitted in the same way that he is not. Does not the very answer involve that he is deprived of compensation—excluded from all right—though he is not guilty of the misconduct imputed if he be in fact guilty of other misconduct? No doubt that would be the result of the law in an action of wrongful dismissal, and I ventured to observe during the hearing—"May a man who has been found to have been rightly dismissed for misconduct in an action of wrongful dismissal, nevertheless bring an action under the 116th sect. of the Local Government Act? It would be an anomaly and a scandal if it were so." Not that I say one word now against Mr. Kenealy; his moral character has not been impeached, and I really regret that things have come to the pass that they have in this case. No one will say for a moment that he was guilty of any moral misconduct, except so far as moral misconduct is involved in not obeying the reasonable mandates of his masters. Now, the jury have found in the plaintiff's favour upon the question of these letters. I think there was a miscarriage as regards the letters; I think there was a misdirection as to the *prima facie* effect of the fact that the letters were given in England in the usual way there to be posted; but in my opinion it is quite plain that the defendants can rely on other grounds of misconduct, provided there was no surprise occasioned to the plaintiff. In this case the particulars in the most clear and definite manner pointed out that the defendants relied upon other grounds, namely, that the plaintiff wilfully disobeyed the reasonable orders of the Corporation. If a man in the position of the plaintiff wilfully disobeys the reasonable orders of his employers, he is unquestionably guilty of misconduct, which warrants his dismissal. The jury found, in the first place, that the plaintiff would not give the Corporation an account of his remuneration, his salary, and emoluments; a thing that was very easy to do. His emoluments were derived,

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to a certain extent, from the Grand Jury; the amounts could have been easily ascertained in half an hour, but the plaintiff, most unwisely, distinctly refused to comply with the reasonable requests of the Corporation to give particulars of these emoluments. Still further it was proved that the Corporation passed a resolution that certain particulars of goods ordered to be supplied should be sent in; a resolution to that effect was passed, and the plaintiff was directed by the Corporation to circulate it. He did not do so. It was a most prudent thing on the part of the Corporation to do, but the plaintiff would not comply with their directions. That amounted to wilful disobedience of a reasonable order. The jury have found that he was guilty of misconduct, and in my opinion there was sufficient evidence to justify that finding; I have no wish to refer to other matters, but I take these two instances; I will refer later on to his refusal to return the records of the Corporation.

It appears, then, that the Corporation's reasonable directions and orders have been wilfully disobeyed. It is said that this has been condoned, but no condonation has been found. Mr. Healy, in his argument (and the question of condonation was touched upon by him for the first time, and was not referred to by Mr. Samuels), urged that on the 2nd July there was an attempt made to fix his salary, and to keep him on, and that that afforded evidence of condonation. There may be in the case some evidence of condonation; I do not say whether there is or is not such evidence. But the jury have found that the plaintiff was guilty of wilful disobedience, and there is no finding that it was condoned. Mr. Samuels objected to any question as to wilful disobedience being put to the jury other than the question as to the letters; condonation as regards the letters was put to the jury, but not with reference to the acts of wilful disobedience. Is it to be said now in that condition of affairs that a new trial should be granted? It would be contrary to every rule of practice in this Court. Take the case of *M'Dougal* v. *Knight* (1)—a very important case decided in the House of Lords. In that case it appeared that there was a report of a judgment only of a judge, and the issue was raised as to whether it was a correct report. The judges, including Lord

(1) 14 A. C. 194.

Halsbury, were of opinion that a much larger question should have been left than the mere question as to whether the judgment was correct or not, that the question should have been left as to whether the whole trial was correctly reported; but inasmuch as the question was confined to the one point, they said they would not set aside the judgment. It was laid down in the most distinct manner in that case that the parties were bound by the course of the trial, and that it could not be subsequently argued that a certain question should have been put, and that the verdict should be set aside on that ground. So much for that portion of the case. I come now to an important point, namely, the refusal by the plaintiff to return the records of the Corporation when they were asked for. He was asked, by the resolution of the 16th October, to return them to the Mayor or some person on his behalf, and he refused to do so. Nothing could be more serious than this disobedience. That resolution was subsequently adopted and confirmed at a general meeting of the Corporation, and when they asked the plaintiff to give back, in pursuance of his contract of service, the documents belonging to them, he refused to do so. Could there be a graver ground of misconduct on the part of an employee? There is no question of condonation at all suggested in reference to this, and the refusal on the part of the plaintiff to hand back to the Corporation their public records afforded, in my judgment, abundant ground to warrant his dismissal. If, as has been very strenuously argued, the dismissal was for misconduct generally, without any specification of grounds of dismissal, then the misconduct involved in the refusal to give up the documents of the Corporation relieves the case from all difficulty. However, I have dealt with the matter as if there was a specification of grounds of dismissal, but one of those grounds failed, and there was misconduct in fact. It is a sad and painful case, but I think that on the findings of the jury the plaintiff must fail in his claim under the 116th section, as well as under the ordinary count for wrongful dismissal. Several cases have been cited to show that the motive of dismissal is immaterial, provided there was misconduct; but the cases to this effect are so numerous, and the proposition so well established, that it is unnecessary for me to deal with them. Taking the findings of the jury, as a whole, I regret to say that I

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must decide against the plaintiff, and give judgment against him with costs. I have not adverted to the question that has been debated as to the form of the remedy—whether it should be by action or by mandamus. I have disposed of the matter on the merits.

MADDEN, J. :—

I have felt throughout the argument of this case considerable difficulty in accepting and acting upon the findings of the jury, as completely and satisfactorily disposing of the questions which were really in issue between the parties. In the end, however, I have come to the conclusion that I am bound to do so, in obedience to the rules which have been laid down by the highest authority for our guidance in such matters.

The plaintiff sues in this case for the purpose of enforcing a statutory right, which I assume, for the purpose of my judgment (but without so deciding), to be enforceable by action at law against the defendants. His legal position is that of a town clerk lawfully dismissed by the defendants under whom he held office at pleasure. His statutable right is to compensation assessed as provided by the 116th section of the Local Government Act of 1898. He is clearly entitled to this compensation, if he has been removed from office for any cause other than misconduct or incapacity, and this Court has held in *Reilly* v. *Cootehill Urban District Council* (1), that misconduct or incapacity, in order to disentitle an applicant to compensation under this section, must be shown to exist in fact. Incapacity is out of the case on the findings of the jury; and the dismissal being for misconduct, as well as for incapacity, the plaintiff's right to recover depends on the answer to the question—Had the jury before them reasonable evidence of misconduct within the meaning of the 116th section, upon which the defendants were in a position to take action when they dismissed the plaintiff on the 7th of May, 1900?

The legal position of a town council in resisting a claim for compensation under this section is not the same as that of a

(1) 1 New Ir. Jur. 67.

defendant in a common law action for wrongful dismissal. A master dismissing a servant may justify by proof of any state of facts that would have afforded a ground of dismissal, although not alleged by the master as the reason for his action, and even if the facts were unknown to him at the time of the dismissal: *Spotswood* v. *Barrow* (1). If misconduct on the part of a discharged servant is found to exist as a matter of fact, the jury ought not to be asked to find whether this misconduct was the cause of dismissal: *Ridgway* v. *Hungerford Market Company* (2). These decisions do not apply to a claim under the 116th section, for the precise question to be investigated is the cause of dismissal, in order to ascertain whether or not it was other than misconduct. Counsel for the plaintiff required the learned Judge to submit this question to the jury in the words of the statute. I do not think that he was entitled as a matter of right to have the question raised in this form; indeed, if it were understood to involve an inquiry into the motives operating on the minds of the individuals who formed the majority of the council, it would lead to a miscarriage of justice.

Looking at the substance of this matter, there can be no doubt in the present case as to the cause for which the plaintiff was dismissed. The defendants, being a Corporation, speak only by their minutes, and the resolution of the 7th of May dismisses the plaintiff for misconduct in general terms. It is unnecessary to consider whether the defendants, if they had specified any definite act of misconduct as the cause of dismissal, could afterwards rely on a different act as disentitling the applicant to compensation. When misconduct is alleged generally as the ground of dismissal of a town clerk by a corporate body, it is, in my opinion, open to it to resist a claim for compensation on the ground of any misconduct warranting dismissal at common law, which was known at the time, and which could therefore have afforded a reason for dismissal. I again guard myself from expressing an opinion as to whether, under the words of the 116th section, they could have relied on misconduct, unknown to them at the time, which could not, therefore, have been the cause of

(1) 5 Exch. 110. (2) 3 Ad. & Ell. 171.

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dismissal. This question does not arise in the present case, inasmuch as all the alleged acts of misconduct were known to the defendants on the 7th of May, 1900.

Now misconduct is a word of flexible meaning. It is applicable to acts differing widely in gravity. It is, I think, clear that the misconduct referred to in the 116th section must be of such a character as to afford a defence in a common law action for wrongful dismissal, and in this respect the cases which have been decided on this branch of the law appear to be in point. It is not necessary to examine them in detail, for it is quite settled that the kind of misconduct alleged by the defendants, if established in evidence, is such as would justify dismissal. A servant may be dismissed for wilful disobedience of a lawful order of his employer, or for negligence calculated seriously to injure his master's business.

The acts of misconduct on which the defendants rely fall within one or other of these classes. They are—(1) the alleged misconduct with regard to the Board of Trade letters. This, if established in proof, would have constituted culpable negligence in the discharge of official duties. (2) Other alleged acts of misconduct prior to the resolution of 16th October, 1899, consisting in non-compliance with certain resolutions passed in February and March of that year. (3) Alleged misconduct after the resolution of 16th October, 1899, by which the defendants purported to dismiss the plaintiff, in retaining possession of books and other documents the property of the defendants. The jury have found as to (2) and (3) that the orders disobeyed by the plaintiff were reasonable, and their finding on this issue must be accepted as conclusive.

Now if there is anything clear in the case it is that the occasion of the dismissal of the plaintiff was alleged negligence in the matter of the Board of Trade letters. All the documents in the case—resolutions, report, and the case laid before Mr. Bushe—lead to the same conclusions. It is equally clear that the plaintiff has been deprived of compensation on account of conduct which was well known to the defendants when they dismissed him, as to which they were silent, although eloquent on the subject of the Board of Trade letters, and obviously desirous of finding some means of

fulfilling their election pledges by dismissing the plaintiff in such a manner as to disentitle him to compensation. It is this circumstance that prevents me from regarding the conclusion at which I am compelled to arrive as altogether satisfactory. If, however, I am right in holding that the defendants, speaking through their minutes, have dismissed the plaintiff for misconduct generally, and that this must be taken as the cause of dismissal, the history of the case, and the dealings between the parties, are of importance, not for the purpose of ascertaining the cause of dismissal, but on the question of condonation of certain acts or omissions on the part of the plaintiff, which, if uncondoned, might have justified a dismissal on the ground of misconduct.

Here, again, the decisions on the common law action of wrongful dismissal appear to be in point. The principle has been clearly laid down that, even in a case of fraud, the master, on discovering the misconduct of the servant, "is not bound to dismiss him, and if he elects, after knowledge of the fraud, to continue him in his service, he cannot, at any subsequent time, dismiss him for that which he has waived or condoned": *per* Blackburn, J.: *Phillips* v. *Foxall* (1). In the words of Cotton, L.J. (*Boston Deep-Sea Fishing Co.* v. *Ansell* (2)), if the master "knows of the act, and still continues to employ him (the servant), it might have been held by judges of fact, or by a jury, that he had condoned it, and prevented himself from insisting on the legal right."

Turning to the facts of the case, I find that non-compliance with certain directions of the defendants, declared by the jury to be reasonable, occurred prior to July, 1899. This is misconduct involving no moral turpitude, and which might well be regarded as calling for warning, rather than dismissal. I find also that so far from dismissing or even warning the defendant, they passed a resolution on the 7th July, 1899, by which they attempted to reduce the plaintiff's salary. It is said that this was a penal proceeding, but it was one based on the continuance of the plaintiff in the office of town clerk. And from July, 1900, until the delivery of the particulars in the present action, nothing is heard of this alleged misconduct. Great stress was laid on the

(1) L. R. 7 Q. B. 680. (2) 39 Ch. D. 339.

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plaintiff's non-compliance with the resolution of 7th November, requiring him to furnish a return of his emoluments during the past ten years, and naturally, for it is certainly more important than the plaintiff's neglect or refusal to attend from 10 to 4 in a non-existent office, for what purpose it is not easy to divine. Referring to this resolution, Mr. Egan, the then treasurer, from whom the returns were obtained, says: "Until this action no charge was made against the plaintiff about the matter." And, so far as I see, the same statement might be made as regards each of the acts of misconduct which I have classified as No. 2. It is said that the plaintiff has disentitled himself to rely on condonation by making the case that he was the victim of persistent persecution. It is undoubtedly true that the defendants never condoned the offence committed by the plaintiff in continuing him in the office of town clerk. But the greater their desire to remove him from that office, the more significant is the fact that they did not think it expedient to rest his dismissal on any of the acts of disobedience on which they now rely.

There are two ways in which the opinion of the jury might have been taken on this state of facts. They might have been asked, in terms, whether the alleged misconduct had been condoned by the defendants before the 7th May, 1900. This was not done. Or they might have been told that they ought not to answer question No. 1 in the affirmative, if the defendants had, by their conduct, after knowledge of the alleged misconduct, disentitled themselves to act upon it. This would have been raising the question of condonation in another form. That this was not done is evident from the fact that the issue of condonation was expressly raised, and submitted to the jury, with reference to the Board of Trade letters. It is said that we might hold condonation under the power to draw inferences of fact, or send the case to a new trial. The former course is impossible, as the issue is one eminently for a jury, and there are difficulties in the way of adopting the latter, having regard to the circumstance that the learned Judge was not asked to submit the question of condonation to the jury, in any shape or form, except as regards the letters. I am much impressed by the difficulty which has been caused by the course of the trial, and I am not to be taken as dissenting from

the views expressed by the Lord Chief Justice on this part of the case. But I am relieved from the necessity of considering whether those difficulties are insuperable, by the conclusion at which I have arrived upon the last-mentioned alleged misconduct. This consists, as found by the jury, in the detention by the plaintiff of the books and other documents belonging to the defendants after the passing of the resolution of 16th October, 1899, by which the defendants purported to dismiss the plaintiff, in pursuance of the report of the committee in the matter of the Board of Trade letters. I can find no evidence of condonation as regards this misconduct, and the only question that appears to me to arise in regard to this question is whether the answer of the jury is such as twelve reasonable men might have given.

The plaintiff's case throughout has been that he continued in the office of town clerk until he was legally dismissed by the resolution of the 7th of May. The defendants at one time relied on the resolution of the 16th of October, 1899, as terminating the plaintiff's employment. But they subsequently abandoned this position, and the trial seems to have proceeded on the basis of the plaintiff's continuance in office until the 7th of May. If he were at liberty to take up the position that he had been dismissed from office in October, no subsequent action on his part, however reprehensible, could amount to misconduct in the discharge of the official duties of a post which he had ceased to fill. But the plaintiff has not taken up this position either before or at the trial. I think the opinion of the jury was properly taken upon the question of the detention of the Corporation books and papers, and it was for them to say whether it was misconduct within the meaning of the question, as I understand it, that is misconduct justifying dismissal on the 7th of May.

There are two views of the plaintiff's conduct with regard to these documents, and it was for the jury to decide between them. They might have treated the plaintiff as between him and the defendants, as having been practically, though not formally, dismissed in October. They might have regarded the subsequent detention of the papers by the plaintiff as amounting to a mode of resisting an illegal attempt to thrust him out of office, not legally justifiable, but something different from misconduct in the discharge

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of the duties of the office from which he was treated by the defendants as evicted, and if the verdict of the jury had been to this effect I should not have quarrelled with their decision. Or they might have held the plaintiff bound by his contention that he was still town clerk when he refused to give up the documents on the requisition of the defendants. The resolution of the 2nd of May, 1889, by which the duties of the town clerk were defined, provided that he should "keep in safe custody all documents, &c., entrusted to him and return the same, unimpaired, whenever directed by the Corporation." The plaintiff was directed by the resolution of the 16th of October to deliver up all documents belonging to the Corporation within one week, the borough treasurer being named as the person authorised to take charge of them. Then followed a resolution of the 14th of November, 1897. The detention of the documents is mentioned as a ground of complaint in the case laid before Mr. Bushe. And on the 7th of May, 1900, it was resolved that the necessary steps should be taken to recover the books and documents in question. Although the subsequent conduct of the plaintiff, which resulted in the order directing a writ of mandamus to issue, would not amount to misconduct in the discharge of the duties of an office which he had ceased to hold, the jury probably regarded it as throwing some light on the persistent detention of the defendants' papers. If the plaintiff, by his unwarrantable detention of the Corporation papers, must be held to have disentitled himself to compensation, it is satisfactory to know that a decision on this ground governs no other case, and does not weaken the protection afforded to existing town clerks by the 116th section of the Local Government Act.

In order to disentitle an applicant under this section to compensation, it must be proved that the cause of his dismissal was misconduct, and that misconduct existed in fact. I am clearly of opinion that it is in such a case necessary not only to prove misconduct in fact, but that misconduct was the cause of dismissal. If the corporate body, at the time they dismissed him, had knowledge of certain acts of commission or omission which they overlooked at the time when they occurred, and subsequently raked up on failure of the principal charge upon which the dismissal was based, the applicant must rely on the good sense and fairness of

juries, who will, no doubt, be instructed in words such as those which I have quoted from the judgments of Lord Blackburn and Cotton, L.J. No such question arises in the present case with regard to the detention of the documents, and I am, therefore, of opinion that the finding of the jury on this part of the case is conclusive against the plaintiff's claim.

BOYD, J.:—

I concur: I do not consider it necessary to go through the evidence in detail, having regard to the judgments which have been already delivered.

The case was tried at considerable length before a jury of the city of Dublin, and issues were left to the jury—whether the plaintiff was guilty of misconduct, and also whether he was dismissed for misconduct—and the jury have found both these issues in the affirmative. The jury have found that the plaintiff was guilty of misconduct in disobeying the lawful and reasonable orders of the Corporation, and that he was dismissed for misconduct. The 116th section of the Local Government Act, on which the plaintiff's claim for compensation is based, provides expressly that if the party be guilty of misconduct, and if he be dismissed for that misconduct, he is not entitled to compensation; and the question for us is whether there was evidence to support the findings of the jury. I think there was abundant evidence to support these findings.

It appears to me that ever since the new Corporation came into existence, and down to the present time, there have been more or less strained relations between the plaintiff and the Corporation; there may have been faults on both sides, but I think the plaintiff forgot that he occupied the position of a servant of the Corporation who was bound to obey their reasonable and lawful orders, and exposed himself to the consequences of his forgetfulness.

In my opinion these orders of the Corporation, properly given, and regularly disobeyed time after time, left no option to the Corporation but that they should dismiss the plaintiff, and dismiss him on the ground of misconduct. It is said there was condonation as regards some of these acts of disobedience. I fail to see that

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there was any evidence of condonation, or that such an issue should have been left to the jury; there was no allegation of condonation until the very end of the trial, and when the issue in reference thereto was submitted, it was properly objected to. I think on the whole of the facts proved there was no evidence in support of it.

The jury did find that as regards the letters from the Board of Trade the Corporation condoned the offence; but if there was one matter on which the Corporation insisted more than any other and never abandoned, it was the misconduct of the plaintiff in reference to these letters. They never retracted anything done on the occasion of the first dismissal, but persisted in their condemnation of the plaintiff's conduct in reference thereto; and, in my opinion, there is no evidence of condonation to support the finding of the jury in that respect.

I have come to the conclusion as regards the whole case that on both sides there has been a good deal of wrong conduct; I think that there has been a nagging at Mr. Kenealy for a considerable time on the part of the Corporation, but he ought to have remembered that he was a servant of the Corporation, and bound to obey their orders if reasonable and lawful. He disobeyed such reasonable and lawful orders on several occasions—in his refusal to give particulars of his salary and emoluments from other sources, in his omitting to enter the minutes of the meetings and to send out the orders made by his masters as he was directed to do, and finally and lastly, it is unreasonable that an officer dismissed as he was for a plain breach of duty should insist upon retaining in his possession the documents of the Corporation, documents which were vitally important to them for the carrying on of their business. These were gross acts of misconduct, for which the plaintiff was answerable; and in my opinion the Corporation rightly dismissed him, and his action must fail.

KENNY, J.:—

In this case both plaintiff and defendants move for judgment, and, in the alternative, ask for a new trial. The plaintiff is the late town clerk of the Corporation of Kilkenny, and the action is brought to enforce compensation under the Local Government Act,

1898, in respect of his removal from office, and there is also an ordinary Common Law claim for damages for wrongful dismissal. The former is based on the 116th section of the Local Government Act, 1898, which, while not in the least altering the tenure of the town clerk, enables one who is dismissed from any cause, other than misconduct or incapacity, to claim compensation in accordance with the scale mentioned in the schedule to the Act. We have heard so little of the second claim—that in respect of the Common Law action for dismissal—and the course of the trial having proceeded on the basis of the claim for compensation being the substantial one, that I think we may take the former as abandoned or not worthy of consideration.

Put briefly, the substantial issue between the parties was whether, on the replies by the jury to the questions left to them by the learned Judge, there has been a finding of such misconduct on the part of the plaintiff—within the meaning of the 116th section—as would disentitle him to any compensation; and, whether the evidence was such as to justify such a finding.

At the inception of the arguments two questions on the construction of the 116th section were presented to us, and, speaking for myself, I have formed a very clear opinion with reference to them. Indeed, as to the second of these questions, the plaintiff's view was, I think, not seriously pressed. The first of these questions was—whether, in order to justify dismissal without compensation, it was essential for the Corporation to establish actual misconduct as distinct from what they might allege to be such? and the second, whether the Corporation could rely on an *act* of misconduct as justifying dismissal other than that for which they purported to dismiss the plaintiff? On the first of these questions there has been already a decision of this Court in *Reilly* v. *Cootehill Urban District Council* (1), which would be binding on us, even if we did not agree with it. But the judgment of the Chief Baron is so eminently in accord with justice and common sense, that it has our entire concurrence. It would be an unfortunate interpretation of the section if it were

(1) 1 New Ir. Jur. R. 67.

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held that the Corporation could, even with perfect *bona fides*, be placed in the position of having uncontrolled discretion in the selection of the instances of what they might regard as misconduct. The Act never intended to place in their hands the arbitrary power of depriving their town clerk of compensation, unless for proved incapacity or misconduct, such as would legally justify an individual master in dismissing an employé without notice. On the second question, the plaintiff had to go the length of contending that a wholly different rule to that which has been established by a succession of authorities as governing the right of dismissal for cause in ordinary cases, should be applied to cases under this section. There can be no doubt, outside of the section, that a cause of dismissal may be relied on other than that in respect of which the employer purports to dismiss, and may be held a good and valid cause, though unknown to the employer at the time of dismissal. The last important case on the subject is the *Boston Deep-Sea Company* v. *Ansell* (1), where what was held to be an insufficient ground of dismissal was at the time relied on for the dismissal, yet the employer successfully resisted the plaintiff's claim for damages, on a ground of misconduct not known to him until after action brought. If the valid ground of dismissal was known but not relied on at the time of dismissal, it might become a jury question whether the act in question had not been waived or condoned. Such being the settled law in ordinary cases, it seems to me that a very monstrous result, and one that was pointed out by the Chief Justice at an early stage of the argument, might result if a different rule was to be applicable to cases within the section. For instance, the town clerk might have been removed from his office on a stated ground, wholly inadequate in law to justify his dismissal, yet if it should be subsequently discovered that he had been guilty of peculation or falsification of accounts, and wholly unworthy of public trust, he would still be entitled to compensation under the section. In such a case it could not be contended that because there was not a good ground of dismissal he was not dismissed at all, and that

(1) 39 Ch. D. 339.

the Corporation would still retain the right to dismiss him on a valid and legal ground, and thereby be enabled to effectually deprive him of compensation—inasmuch as, the tenure of the office being one at will, it was determined once and for all by the fact of dismissal, whether the ground for the latter was a good or a bad one. Plaintiff's counsel was impressed with the force of this illustration, and, as I have already said, did not in subsequent argument press the point with much, if any, force.

These points being disposed of, the remainder of the case stands thus:—There were two sets of questions left to the jury. Both sets were directed to the fact of misconduct—the one having relation to the letters, and the other to matters unconnected with the letters. The jury found for the plaintiff on the questions that dealt with the letters, and on the other issues they found that the plaintiff had been guilty of misconduct, first, by wilful disobedience of the reasonable orders of the Corporation; and secondly, by retaining records and other property of the defendants. The plaintiff contends that this finding of misconduct is not exhaustive, and that consistently with it the specific acts might not have been such as would have justified dismissal on the 7th May, 1900. He further says that there was no evidence to warrant these findings, and that at least there should be a new trial. I confess that at the outset of the arguments I, in common with my brother Madden, thought the finding inconclusive; but, on consideration, I think that the parties must be taken as having consented to try the issue as to misconduct warranting dismissal, in the form in which the learned Judge left it to the jury. In other words, they accepted the question as one which, if found in the affirmative, would, at the same time, determine in favour of the defendants any case which could possibly be put forward, either of the act of disobedience not being such as would in itself justify dismissal on the 7th May, or of condonation. This view is strengthened by the circumstance that the plaintiff's counsel expressly asked that a question should be left to the jury as to condonation in connexion with the letters, and yet did not consider it necessary to do so in connexion with the general charge of misconduct. Therefore, I think that, according to the course of the

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trial, the plaintiff accepted the question as one, the determination of which involved, without any other, the right to dismiss. In effect, the jury have found, so far as disobedience is concerned, that (1) the orders given by the Corporation were reasonable ones; (2) that the plaintiff wilfully disobeyed them; (3) that such disobedience warranted dismissal; and (4) that defendants had not, on the 7th May, 1900, waived or condoned that disobedience.

As to the evidence on which the jury have found misconduct, I would not be justified in going through it in detail, after the analysis to which it has been subjected by the other members of the Court, in which I altogether concur. It was said that the real motive for the dismissal of the plaintiff was not to be found in what is now alleged to have been misconduct on his part, but in the malignant schemes of certain members of the Corporation and others, to get rid of him, *fas aut nefas*. If the element of malignancy be omitted, I do not say that there were no circumstances in the case to afford ground for the contention that there was a desire for his removal; but we have to deal with the acts of a corporate body—acting, presumably, in the interests of the ratepayers, and I could not for a moment hold that body bound by the designs of individual members.

I, therefore, think that judgment should be entered for the defendants, and in coming to that conclusion, I do so irrespective of the very serious objection to the maintenance of this action and to the form of judgment which the plaintiff would ask us to enter for him were we deciding in his favour, which has been urged on the ground that mandamus was the plaintiff's proper remedy, and not an action at law, such as the present. If it were necessary for me to express an opinion on the point, it would be one, as at present advised, adverse to the plaintiff.

R. ST. J. C.

Appeal. June 4.

The plaintiff appealed to the Court of Appeal (Lord Ashbourne, L.C., and FitzGibbon, Walker, and Holmes, L.JJ.),

who unanimously upheld the decision of the King's Bench Division.

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[Leave to Appeal to the House of Lords was subsequently refused by the Committee of Appeals (1).]

Solicitor for the plaintiff: *Nicholas Shortal.*

Solicitor for the defendants: *James Harte.*

R. D. M

LENNON *v.* MEEGAN (2).

K. B. Div. 1903. June 11, 12, 18.

Civil-bill ejectment on title—Dismiss on the merits—Estoppel—14 & 15 Vict. c. 57, ss. 111, 133—37 & 38 Vict. c. 66—40 & 41 Vict. c. 56, s. 54.

The plaintiff had brought a civil-bill ejectment on the title, which had been dismissed, the dismiss purporting on its face to be "on the merits":—

Held, that such dismiss did not estop the plaintiff from bringing a subsequent civil-bill ejectment on the title for the recovery of the same lands against the same defendants, although there had been no change of title in the meantime.

O'Donnell v. *Ryan* (7 Ir. Jur., O. S. 127) and *Flaherty* v. *M'Donagh* (2 New Ir. Jur. R. 170) commented on.

CASE STATED upon the trial of a civil-bill appeal by Holmes, L.J.

The material portions of the case were as follows:—

"1. This was a civil-bill appeal heard by me as a Lord Justice of Assize in county Louth on the 3rd March, 1903.

"2. The civil-bill process had been brought to recover possession of part of the lands of Mullacrew, containing 4A. 3R. 4P. statute measure, or thereabouts, with the house and other buildings thereon in the parish and county of Louth.

"3. The County Court Judge gave a decree for possession, from which the defendants appealed.

"4. The lands were held in fee-simple, and the root of the plaintiff's title was marriage articles, dated 7th January, 1860.

(1) *Ex relatione* Mr. J. J. Clancy, M.P.

(2) Before PALLES, C.B., and ANDREWS, BARTON, and WRIGHT, JJ.

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"5. The plaintiff claimed that there was in the events that have happened a resulting use to the settlor in those articles, and that he, as the heir-at-law of such settlor, was now entitled to possession.

"6. I am satisfied that prior to the year 1896 the plaintiff became entitled to the premises sought to be recovered, and has since continued to be so entitled; and this case is stated on the assumption that the plaintiff was entitled to have the decree for possession affirmed unless the dismiss of a former ejectment process is an answer to the plaintiff's action. The process referred to was dated the 9th January, 1896; and it is admitted that although there is a little variance in the description, the lands sought to be recovered therein are the same as those now sued for. It is also admitted that the same questions were then in controversy between the plaintiff and the principal defendant, who claimed by an adverse title, and that no change of circumstances has occurred since. The former process was dismissed on the merits on the 28th January, 1896, by the same County Court Judge who gave the decree now appealed from.

"7. Mr. O'Shaughnessy, on behalf of the defendants, relied on this dismiss, and referred to a recent decision of Mr. Justice Andrews, and to section 133 of 14 & 15 Vict. c. 57.

"8. Mr. Thompson, for the plaintiff, sought to distinguish between a decree for possession in a civil-bill ejectment and a dismiss, pointing out that the decree declares the plaintiff is entitled to the possession of the premises, and the dismiss merely declares that the plaintiff failed to prove his case. It is to be observed, however, that this is the formula used in all civil-bill dismisses (see schedule (C) of the Act of 1851, form 27), and it could hardly be argued that if a defendant was sued as acceptor of a bill of exchange, a dismiss on the merits would not be final.

"9. Mr. Thompson, at a later stage of the circuit, called my attention to *The Irish Land Commission* v. *Ryan* (1); but while it was held in that case that although a dismiss on the merits of a civil bill for arrears of tithe rentcharge in the year 1896 did not estop the plaintiff from suing for arrears alleged to have become

(1) [1900] 2 I. R. 565.

due subsequently to 1896, it was assumed that the dismiss was conclusive as to its own subject-matter, *i.e.* the arrears sought to be recovered in the first civil bill; to hold otherwise would have destroyed the distinction between a dismiss on the merits and a dismiss without prejudice.

"10. Mr. Thompson also submitted that a dismiss on the merits is not an appropriate judgment in an ejectment, and I do not remember having seen one before; but section 111 of the Act of 1851 seems *prima facie* to apply to all civil bills. Section 1 of 37 & 38 Vict. c. 66, and section 54 of 40 & 41 Vict. c. 56, although not quoted in argument, seem to me to have some bearing on the question as implying that, although the decision of the County Court Judge shall not be evidence of title in an action relating to other lands, it is evidence in an action relating to the same lands.

"11. Both parties were desirous that I should state a case, and having made many inquiries as to whether there has been an authoritative decision on the point, and having failed to find one, I consented to do so."

The question reserved was whether the dismiss of the 28th January, 1896, was a conclusive answer to the subsequent civil bill.

The dismiss of the 28th January, 1896, was in the following terms:—"It appearing to the Court that the plaintiff caused the defendants to be served with a civil-bill process to appear here at the present sittings for recovery of part of the lands of Mullacrew, containing 3½ acres Irish plantation measure, or thereabouts, in the parish of Louth, and barony of Louth, and that the plaintiff failed to prove said case, it is, therefore, decreed by the Court that the plaintiff's bill be, and the same is, hereby dismissed on the merits, and that the defendants do recover against the plaintiff the sum of £1 10*s.* 6*d.* costs and expenses of this dismiss, and the several sheriffs," &c.

Donaldson, for the defendant:—

A civil-bill decree in ejectment is conclusive between the parties where no question arises as to the identity of the premises, or the jurisdiction of the Court, and no new title has accrued to

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the plaintiff: *Condon* v. *Kingston* (1); *Betty* v. *Nail* (2); *Coneys* v. *Coneys* (3); *Doyle* v. *Keenan* (4); *Flaherty* v. *M'Donagh* (5). There is no distinction in principle in this respect between a decree and a dismiss on the merits. By section 133 of 14 & 15 Vict. c. 57, decrees and dismisses, where no appeal has been taken, are alike made absolutely final to all intents and purposes. See also *Flitters* v. *Allfrey* (6). In *The Irish Land Commission* v. *Ryan* (7), the two civil bills were brought in respect of different subject-matters; the arrears of tithe rentcharge sought to be recovered in the second civil bill had accrued subsequently to the former dismiss; that case, therefore, has no application here. The reason why a judgment in ejectment was not an estoppel was that under the old practice the parties named upon the record were merely fictitious, and, therefore, there was a difficulty in showing that the parties in the second ejectment were the same as in the first. Accordingly, when the Process and Practice Act, 1850, was passed, and the action of ejectment made a proceeding between the real parties to the suit, it was held that a judgment in ejectment had the same conclusive effect as a judgment in any other action: *O'Donnell* v. *Ryan* (8). That was the state of the law at the time of the passing of 14 & 15 Vict. c. 57. The law as so laid down was subsequently altered, with respect to judgments in ejectment in the Superior Courts, by the Common Law Procedure Act, 1856, sect. 94, which restored the old rule as to the non-conclusiveness of judgments in ejectment; but this provision did not apply, and has never been extended, to civil-bill ejectments. As to such ejectments, therefore, the principle of *O'Donnell* v. *Ryan* (8) still applies, viz. that being between the real parties a decree or dismiss is as conclusive as in any other case. Effect must be given to the words in the present dismiss "on the merits." Section 111 of 14 & 15 Vict. c. 57, gives power to the County Court Judge to dismiss either without prejudice, or on the merits. By section 3 of 37 & 38 Vict. c. 66, that Act is to be construed as one with 14 & 15 Vict. c. 57; therefore, the provisions of sect. 111 of the

(1) 7 Ir. Jur. (O. S.) 247.
(2) 6 I. C. L. R. 17.
(3) 8 I. C. L. R. 379.
(4) 9 L. R. Ir. 168.
(5) 2 New Ir. Jur. R. 170.
(6) L. R. 10 C. P. 29.
(7) [1900] 2 I. R. 565.
(8) 7 Ir. Jur. (O. S.) 127.

last-mentioned Act apply to ejectments brought under 37 & 38 Vict. c. 66, as extended by 40 & 41 Vict. c. 56, sect. 54.

John G. Thompson, for the plaintiff :—

Condon v. *Kingston* (1) was an ejectment for non-payment of rent under the 73rd section (since repealed) of 14 & 15 Vict. c. 57, which contained stringent provisions barring the tenant, after possession had been taken under a decree, from all relief at law or in equity, unless some of the steps mentioned in the section were taken. The decision in *Doyle* v. *Keenan* (2) appears to have been arrived at by applying the analogy of an action for mesne profits brought after a prior ejectment. In such action, no doubt, the prior ejectment, if properly pleaded, was conclusive, but this was always considered as an exception to the general rule. *Flaherty* v. *M'Donagh* (3) is merely a circuit decision; it was decided on the words of sect. 133 of the 14 & 15 Vict. c. 57. It is submitted, however, that the object of that section was merely to take away *certiorari*, and it was certainly not intended to give civil-bill decrees and dismisses greater efficacy than judgments of the Superior Courts. The decision in *O'Donnell* v. *Ryan* (4) was founded on the erroneous assumption that the reason of the old rule that a judgment in ejectment was not an estoppel was that the parties were not real, but fictitious. The true reason, however, for the rule was that all that was recovered by a judgment in ejectment was the possession of the lands, there was no direct adjudication on the title: Cole on Ejectment, pp. 76, 77; Adams on Ejectment, pp. 286, 308; *Ashlin* v. *Parker* (5); *Doe* d. *Strode* v. *Seaton* (6), *per* Lord Abinger, C.B. In *Coneys* v. *Coneys* (7), the decision in *O'Donnell* v. *Ryan* (4) was doubted. It is to be observed, moreover, that the judgment relied on as an estoppel was given on a special verdict in which the title was fully set out.

But even assuming that a civil-bill decree in ejectment on the title is conclusive, a dismiss stands on a different footing. All that appears from the dismiss is that the plaintiff failed to prove

(1) 7 Ir. Jur. (O. S.) 247.
(2) 9 L. R. Ir. 168.
(3) 2 New Ir. Jur. R. 170.
(4) 7 Ir. Jur. (O. S.) 127.
(5) 2 Burr. 665.
(6) 2 Cr. M. & R. 728, at p. 732.
(7) 8 I. C. L. R. 329.

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his case, and it cannot act as an estoppel with respect to anything beyond what is disclosed on its face: *The Irish Land Commission* v. *Ryan* (1), *per* Fitz Gibbon and Holmes, L.JJ. The decision in *Martin* v. *Keilty* (2) appears to overlook the second question in *The Irish Land Commission* v. *Ryan* (1). The words "on the merits" were improperly inserted in the dismiss, and can give it no extra effect. Sect. 111 of 14 & 15 Vict. c. 57, was not intended to apply to ejectments. The form of dismiss (No. 27) given in the schedule to that Act evidently applies only to ordinary civil bills. In the present forms the distinction is clearly drawn between a dismiss in ordinary cases, where provision is made for the dismiss being either without prejudice or on the merits, and in ejectments, where no such provision is made. Any danger of a defendant being harassed by repeated ejectments is prevented by Ord. XVI., R. 4, of the County Court Orders, 1890, under which a plaintiff before proceeding can be compelled to pay the costs of a former dismiss.

Donaldson, in reply, referred to *Fox* v. *Star Newspaper Company* (3); *Armour* v. *Bate* (4); *Bywater* v. *Dunne* (5).

Cur. adv. vult.

June 18.

PALLES, C.B.:—

This is a civil-bill ejectment on the title which comes before us on a case stated by Lord Justice Holmes on the hearing of an appeal from a decree for possession. The question reserved is, whether a dismiss, which purports to be a dismiss on the merits, obtained in a former civil-bill ejectment between the same parties as those in the present suit, is a conclusive answer to the action?

Lord Justice Holmes states that he was satisfied that prior to the year 1896 the plaintiff became entitled to the lands sought to be recovered, and that he has since continued to be so entitled, and the case is stated on the assumption that he is entitled to have the decree for possession affirmed, unless the dismiss is an answer to the action. He further states that the lands now sought to be

(1) [1900] 2 I. R. 565, at pp. 571, 580.
(2) 2 New Ir. Jur. R. 250.
(3) [1898] 1 Q. B. 636; [1900] A. C. 19.
(4) [1891] 2 Q. B. 233.
(5) 10 L. R. Ir. 380.

recovered are the same as those sued for in the former civil bill, that the same questions were then in controversy between the parties, and that no change of circumstances had occurred since.

Both the present and the former ejectments are civil-bill ejectments under the 37 & 38 Vict. c. 66, as amended by the 40 & 41 Vict. c. 56, the jurisdiction to determine which is under 14 & 15 Vict. c. 57, sect. 79, as amended by 36 & 37 Vict. c. 66, sect. 1, and 40 & 41 Vict. c. 56, sect. 54. That section, as so amended, empowers the Civil Bill Courts to hear and determine, within their respective jurisdictions, all disputes and differences respecting *the possession* of any lands, tenements, or hereditaments, the annual value of which, under the Valuation Acts, does not exceed £30—a sum much above the value of the lands here. The dismiss, the effect of which we have to determine, recites that the plaintiff had failed to prove his case, and decrees that the plaintiff's bill shall be dismissed upon the merits.

In *The Irish Land Commission* v. *Ryan* (1) one of the questions which arose before Mr. Justice Johnson at the Assizes was whether a dismiss on the merits of a civil-bill process for a debt operated as an estoppel, and was the second of two questions he reserved for a Divisional Court. It was answered in the negative, and the decision was affirmed in the Court of Appeal. Lord Justice FitzGibbon, in whose judgment the Lord Chancellor concurred, there said:—"Upon the second question I have no doubt that the dismiss on the merits in 1896 does not estop the plaintiffs from recovering in the present action, if otherwise entitled so to do. *The dismiss does not disclose the grounds upon which the action failed.* Lord Justice Holmes says:—"In a Court where the issues knit between the parties do not form part of the record, they may, I think, be proved orally in subsequent proceedings between the same parties, and may be relied on as evidence in favour of, or against, one or other; but I am of opinion that *if so proved, they would not operate as an estoppel.* There is wanting the essential quality to constitute an estoppel by record, and I do not see how they could be used to support an estoppel *in pais.* I am, therefore, prepared to hold that the second question ought to be answered in the negative."

(1) [1900] 2 I. R. 565.

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In the present case the ground of dismiss is that the plaintiff failed to prove his case; that does not involve that the plaintiff had not a good title against the defendant, or anything more than that he had not shown it at the trial. Upon this ground alone, I am of opinion that the question reserved ought to be answered in the negative.

I desire, however, to rest my judgment on another and a broader ground. At common law, and at least until the Process and Practice Act of 1850, and since that time, with the exception of the period between the last-mentioned Act and the Common Law Procedure Act of 1856 coming into operation, although a judgment for the plaintiff in ejectment was an estoppel as to his title in a subsequent action for mesne profits, the estoppel did not apply in other proceedings, and, therefore, an unsuccessful defendant in ejectment might bring a cross-ejectment against the plaintiff who had formerly defeated him, and in the second ejectment re-agitate the same question of title as had been decided in the first action.

The 14 & 15 Vict. c. 57, upon the 79th section of which, as amended, jurisdiction in an ejectment on the title in a Civil Bill Court must rest, was an Act consolidating and amending the Civil Bill Code, and sect. 79 is a re-enactment, with alterations unnecessary to be mentioned here, of a substantially similar provision in a former Civil Bill Act, 6 & 7 Wm. 4, c. 75, sect. 2.

The Process and Practice Act of 1850 is not *in pari materiâ* with the Civil Bill Code, and I am of opinion that, although that Act was passed in the interval between the Civil Bill Acts of 1836 and 1851, it cannot be held to affect the construction of the latter Act, and consequently that the jurisdiction conferred by sect. 79 of the later Act is similar in law to that created by sect. 2 of the former, and that the effect of decrees under each section is identical. This brings me to consider the effect of such a decree under sect. 2 of the earlier Act.

Now the jurisdiction conferred by that section is—as is that conferred by section 79 of the later Act—to entertain disputes as to "the *possession*" of lands, the jurisdiction then exercised in an ejectment at common law; the proceeding in which that jurisdiction is to be exercised is throughout both

Acts called an "ejectment"; the form of the judgment prescribed is that which was then in use in the common law ejectment; and a judgment in such last-mentioned ejectment had, as I have said, a certain well-known, though limited, effect as an estoppel. It would, I think, require a manifest intention disclosed in the Act, either by express words or by *necessary* implication, to give to the judgment in the statutable ejectment an effect more extensive than that of its prototype, the ejectment in the Superior Court; and that necessary implication cannot, in my opinion, arise merely from the fact of the statutable proceeding being one which is to be carried on between real parties *nominatim*, instead of, as was the common law procedure, nominally between fictitious, although substantially between real, parties.

As to the express words relied on, I am of the opinion that the provisions in which they occur were inserted *alio intuitu*, altogether. They are sects. 111 and 133.

The material portion of section 111 is as follows:—". . . . in case the plaintiff in any civil bill shall not proceed with the same, or shall fail to establish his case to the satisfaction of the assistant barrister, such assistant barrister shall, and he is hereby authorised and empowered to, dismiss such civil bill with such costs as are by this Act provided (save as hereinafter mentioned), and either without prejudice to the plaintiff's proceeding by a new civil bill or on the merits, as he shall think just." That section follows section 110, which directs that every decree and dismiss shall be according to the forms in the schedule to the Act. Plainly section 111, instead of giving a greater effect to a decree or dismiss, limits its effect by way of estoppel in certain cases. An ordinary judgment at common law is conclusive between the parties, and this section says that the assistant barrister may, if he chooses, pronounce a judgment which shall not have that effect.

The next section relied on by the defendant is section 133. "Such decrees and dismisses as shall be made and pronounced by such chairman, recorder, and assistant barristers, respectively shall, in case there shall be no appeal therefrom, be absolutely final to all intents and purposes, and shall not be subject to be removed by any writ of error or otherwise to any other of Her Majesty's Courts, or capable of being reversed. . . ." This section deals

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with the finality of the decree as a judgment in the particular action, not with its effect in a subsequent proceeding.

For this reason also, and without in any way trenching on the decision in *O'Donnell* v. *Ryan* (1), or the *dicta* in *Wilkinson* v. *Kirby* (2), I am of opinion that the dismiss was not conclusive. This is not new law, for I find it made the *ratio decidendi* in *Coneys* v. *Coneys* (3). There Monahan, C.J., in delivering the judgment of the Court, says:—"Defendant's counsel relied on the 133rd section of the Civil Bill Act (14 & 15 Vict. c. 57) . . . , and he insists that the effect of this section is to render the decree of the assistant barrister or judge a conclusive bar to the present ejectment. We, however, cannot adopt that argument; we do not think that such is the construction of the section referred to; the effect of the section is merely to render the decree final in the suit, and incapable of being reversed by any direct proceedings for the purpose; and the effect of the decree of the assistant barrister in other collateral proceedings must depend on the provisions of the Act, and the effect given by the Common Law to the judgments of Courts of Justice."

But, further, although, were the question here the exact one which arose in *O'Donnell* v. *Ryan* (1), I should follow it *pro formâ*, leaving its authority to be questioned in the Court of Appeal. I feel at liberty to say that I have the gravest doubts whether it was well decided. By the Common Law Procedure Act of 1856 that decision was rendered inapplicable to future ejectments, so there was but a short time during which there was an opportunity of having the question decided in it reconsidered. I myself remember that when it was pronounced the feeling of the profession was that it was unsustainable. It is thus spoken of by Monahan, C.J., in *Coneys* v. *Coneys* (4):—"We also refrain from giving any opinion on the case of *O'Donnell* v. *Ryan* (1), in the Court of Exchequer, as to the conclusiveness, in any case, of a judgment in an ejectment on the title. The learned Barons by whom that case was decided seem to have thought it a fit case for the consideration of a Court of Appeal. Without presuming to give any very strong opinion on the subject,

(1) 7 Ir. Jur. (O.S.) 127. (2) 15 C. B. 430. (3) 8 Ir. C. L. R. 385. (4) *Ib.* 394.

we also will content ourselves with saying that, should the question again arise, we think it will require a very careful consideration whether a judgment in an ejectment on the title is conclusive as to the rights of the parties." Sharing the doubts thus expressed, I do not feel myself bound to extend the operation of that decision to a subject-matter to which the decision *proprio vigore* did not apply.

Of the cases cited, the effect of three have been, I think, rather misunderstood. I mean *Condon* v. *Earl of Kingston* (1); *Betty* v. *Nail* (2); and *Coneys* v. *Coneys* (3). All of these actions were cross-ejectments by persons claiming through tenants whose tenancies were alleged to have been determined by ejectment for non-payment of rent, and the question in each case was, had there been a valid eviction? Such eviction in case of non-payment of the rent within the prescribed time operated by statute to extinguish the title; but extinguishment, it must be borne in mind, was not the effect at common law of the judgment in ejectment, but the statutable effect not only of a judgment in *a peculiar form* of ejectment, but of non-payment of rent within a prescribed time thereafter.

There are two other cases which I approach with the utmost deference and respect: *Doyle* v. *Keenan* (4), and *Flaherty* v. *M'Donagh* (5). In *Doyle* v. *Keenan* (4) the question here was not only not argued, but was not even glanced at, by counsel; and the judgment of the learned Vice-Chancellor was limited to the questions argued.

Flaherty v. *M'Donagh* (5) is more difficult to deal with. It was a civil-bill appeal heard before my brother Andrews, and it is a great satisfaction to me to learn from him that the few words reported do not correctly represent his judgment. He states also that he pressed the parties to have a case stated; they refused, and he was then forced to express his opinion on the point, and although, no doubt, the greatest weight must be given to that opinion, yet it was a decision given on circuit, where one has not the opportunity of looking fully into the authorities, and is not of

(1) 7 Ir. Jur. (O. S.) 247.
(2) 6 Ir. C. L. R. 17.
(3) 8 Ir. C. L. R. 379.
(4) 9 L. R. Ir. 168.
(5) 2 New Ir. Jur. R. 170.

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course binding on a Divisional Court. My brother Andrews is reported to have said:—"He expressly refrained from deciding whether a judgment in ejectment in the High Court was an estoppel. The words of sect. 133 of 14 & 15 Vict. c. 57, 'Such decrees and dismisses . . . shall, in case there shall be no appeal therefrom, be absolutely final to all intents and purposes . . . and in case of an appeal to the next going Judge of Assize, the order or decree of such Court shall, in like manner, be absolutely final to all intents and purposes,' make a decree or dismiss, or an order made on appeal, an estoppel between the parties." The passage, however, which I have read from the judgment of Monahan, C.J., in *Coneys* v. *Coneys* (1), which is an authority binding on us, was not brought to his notice.

Upon the whole, my opinion is very clear that the question reserved here should be answered in the negative.

ANDREWS, J.:—

The question reserved by Lord Justice Holmes in this case ought, in my opinion, to be answered in the negative. The familiar principle that the plaintiff in ejectment, which is a possessory action, must recover possession on the strength of his own title, applies to ejectment proceedings in the County Court, as well as to the like proceedings in the Superior Courts, and, in my opinion, all that the dismiss of a civil-bill ejectment action decides is that the plaintiff failed to prove the right he claimed to the possession of the lands in question. The defendant's possession consequently remains undisturbed, but there is no affirmative decision in his favour of any right in him to the possession. It is also to be observed that the dismiss does not disclose the grounds on which the action failed, and I need not here do more than refer to the important case of *The Irish Land Commission* v. *Ryan* (2). As it is, however, consistent with the dismiss that the plaintiff had the right to the possession, he has always been allowed to assert and establish it, if he can, in a subsequent civil-bill ejectment action. This has never been permitted after a dismiss on the merits in other actions notwithstanding any of the forms.

(1) 8 Ir. C. L. R. at p. 385. (2) [1900] 2 I. R. 565.

The dismiss of the 28th January, 1896, referred to in this case, is, in my opinion, conclusive of no more than that the plaintiff (as is stated in the dismiss) failed to prove his case. It is final to that extent only, and its being expressed to be "on the merits" cannot, in my opinion, carry its effect any farther, having regard to the very nature of a dismiss in ejectment.

Owing, amongst other things, to the decision in *O'Donnell* v. *Ryan* (1) and *Doyle* v *Keenan* (2), irrespective, altogether, of the opinion I formed and acted on in the civil-bill appeal of *Flaherty* v. *M'Donagh* (3), I do not desire to say more with reference to the effect of a civil-bill *decree* in ejectment, in a subsequent ejectment between the same parties, for the same lands, when the title has admittedly remained unchanged, than that I think those decisions may well be thought fit to be reconsidered, on principle, in any case in which it may be open to reconsider them; but I do not regard the present case stated as one in which they could be effectively reviewed. I need scarcely add, however, that my Lord Chief Baron's observations on them are not only of the utmost value, but of very great weight.

BARTON, J.:—

I am also of opinion that the former dismiss in ejectment on title was admissible, but not conclusive, evidence upon the hearing of the subsequent civil bill between the same parties for the recovery of the same premises. I do not lay stress upon the words "failed to prove his case." These words are common to nearly all dismisses in the County Court; and I purposely refrain from discussing the large general question of estoppel in relation to civil-bill decrees and dismisses in other actions than that of ejectment. Nor do I proceed upon any suggested distinction between decrees and dismisses in ejectment. Decrees and dismisses, upon the principle of mutuality in estoppel, should as a general rule be treated alike. I rest my opinion upon the nature of proceedings in ejectment on title which, whether in the superior or the County Courts, do not amount either in form or in substance to declarations of title in favour of plaintiff or defendant.

(1) 7 Ir. Jur. (O. S.) 247. (2) 9 L. R. Ir. 168. (3) 2 New Ir. Jur. R. 170.

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In the superior Courts (save during the interval between the passing of the Process and Practice Act, 1850, and the Common Law Procedure Act, 1856) the exceptional position in these respects of judgments in ejectment on title has always been acknowledged. The possessory nature of the action; the peculiar rules of pleading under which at one time the defendant was bound to plead "not guilty," and subsequently was allowed to plead "possession"; the indefiniteness of the record; and the impersonal character of the writ of execution—these were some of the elements which contributed to prevent such judgments being treated as conclusive upon the question of title or estate: *Doe* d. *Strode* v. *Seaton* (1) affords an illustration. There were two trials of the action, followed by new trial motions—both reported cases (1). Upon the second new trial motion Lord Abinger said (2):—"A judgment in ejectment is not conclusive evidence, because a party may have a title to possession and to grant a lease at one time and not at another; but it is clearly admissible evidence." Parke, B., said:—"A judgment is in no case conclusive, unless pleaded by way of estoppel. It cannot be pleaded in ejectment, because the defendant is bound by the terms of the consent rule to plead not guilty. But if the parties are the same, it is evidence to go to the jury." Alderson, B., in concurring, referred to passages in Buller's Nisi Prius and in Bacon's Abridgment to a like effect.

In Ireland the Process and Practice Act, 1850 (13 Vict. c. 18), assimilated ejectment to other actions; and it was held in *O'Donnell* v. *Ryan* (3) that a judgment in ejectment was thus rendered conclusive upon the question of title. That case is said to have caused surprise in the profession, and has been referred to in a guarded way in subsequent cases. Before, however, any opportunity occurred of having the decision reconsidered or reviewed, the Legislature interfered, and the old law and practice was restored by section 94 of the Common Law Procedure Act of 1856, which provided that a judgment in ejectment should have no greater force than it had before the passing of the Process and Practice Act, 1850. In order to protect a defendant from repeated

(1) 2 A. & E. 171; 41 R. R. 412; and 2 C. M. & R. 728; 41 R. R. 831.

(2) 2 C. M. & R. at p. 732.

(3) 7 Ir. Jur. (O. S.) 127.

and oppressive actions, power was conferred upon the Court by section 95 of the same Act to order security for the plaintiff's costs of the former ejectment, and to stay proceedings until such security be given. Similar relief is available in the County Court under Order XVI., Rule 4, of the County Court Rules.

Since the passing of the Common Law Procedure Acts and Judicature Acts, the non-conclusiveness upon the question of title or estate of judgments in ejectments on title has been from time to time alluded to by Judges both in England and in Ireland; and it may be useful to quote a few judicial references to the subject. In 1874, in the course of the argument in *Flitters* v. *Allfrey* (1), Grove, J., said, at p. 37:—"The record in ejectment does not show the matters that were in issue. That is the reason why ejectment is the exception" (*i.e.* to the rule as to the conclusiveness of judgments). In 1883 in *Bywater* v. *Dunne* (2), at p. 373, Dowse, B., in the course of a judgment on the effect of a non-suit under the rules then in force, said:—"The only exception is in the case of ejectment. In ejectment a second action for the same lands would be restrained until the costs of the first were paid. No number of ejectments is a bar to a new action . . ." In 1892 in *Howard* v. *Howard* (3), at p. 349, Holmes, J., said:—"The action of ejectment deals with possession, and possession alone . . . The judgment determines no question of title or estate, and the writ of execution by which it is enforced relates to the lands and not to the defendant personally. Hence, it alone, of all actions, is not conclusive between the parties, and it is open to an unsuccessful defendant to seek by a new action begun to-morrow to recover what a writ of *habere* has deprived him of to-day. An action to establish title to lands is essentially different in its incidents and nature. In it the plaintiff seeks to have his title declared good by a judgment that will bind the defendant personally."

Cases like *Wilkinson* v. *Kirby* (4) afford examples of an exception which proves the rule. Perhaps it would be more correct to say that they illustrate the general principles to which I have referred. It is consistent with those principles that judgments in ejectment on title should be conclusive in a consequential action

(1) L. R. 10 C. P. 29.
(2) 10 L. R. Ir. 380.
(3) 30 L. R. Ir. 340.
(4) 15 C. B. 430.

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for mesne rates when offered as evidence, not of title or estate, but only of the right to possession at the time which was material and traversable in the antecedent ejectment action, and was covered by the antecedent judgment in ejectment.

It is possible that other ways may be suggested in which an estoppel may arise in the course of, or as arising out of, an action of ejectment. For example, if a defendant in the Superior Courts pleads an equitable defence, or neglecting to avail himself of the sheltering protection of Order XXI., Rule 21, pleads specially, and so puts in issue precise points which are afterwards the subject of verdict judgment and record, it may be that special considerations might arise and that the materials for an estoppel upon such precise points might be afforded. Similar results might be obtained in the County Courts, *e.g.* by a case stated. But we are concerned in the present case with ordinary judgments in ejectment on title. Subject to all reservation in favour of exceptional instances and considerations such as I have indicated, I think it can hardly be disputed that the non-conclusiveness, upon the question of title or estate, of ordinary judgments in ejectment on title in the Superior Courts has, save for the brief period between 1850 and 1856, when the case of *O'Donnell* v. *Ryan* (1) was the governing authority, always been recognised in our Courts.

If such have been the law and practice in the Superior Courts, we must inquire whether there is any difference in the County Courts, and, if so, why? Within certain limits there is concurrent jurisdiction. Can it be the law that a civil-bill decree or dismiss would be conclusive in a subsequent action of ejectment on title in the Superior Courts between the same parties in respect of the same premises, while a judgment in the Superior Courts would be merely admissible evidence in a subsequent civil-bill ejectment? Is there any difference in principle between the action of ejectment in the two jurisdictions respectively? Is not the action in the County Court also a possessory action trying the question of possession at a certain time? Can it be said that ordinary civil-bill decrees or dismisses in ejectment on title give us more assistance in ascertaining what was the precise matter found or decided by them, than ordinary judgments in ejectment on title in the Superior Courts?

(1) 7 Ir. Jur. (O. S.) 127.

It was suggested, in the course of the argument, that decrees and dismisses in ejectment on title in the County Court should be held to have this conclusive effect, because the Civil Bill Act of 1851 became law between 1850 and 1856, during which interval of time the decision in *O'Donnell* v. *Ryan* (1) governed judgments in ejectment on title in the Superior Court. In other words, I understand it to be suggested that the County Court jurisdiction in ejectment on title was originally conferred in 1851, when judgments in ejectment in the Superior Courts were conclusive; and that, on that account, we ought to hold that decrees and dismisses in civil-bill ejectments on title were, in 1851, intended by the Legislature to be, and have ever since been, conclusive. But it seems to me that this argument loses much of its force, when we remember that the Civil Bill Act of 1851 was, in this respect, in the nature of a consolidation Act, and that the only section (sect. 79), in which a limited jurisdiction in ejectment on title was given, was a re-enactment of the section to the same effect in the old Act of 1836. Furthermore, these sections in the Acts of 1836 and 1851 were first steps in a progressive code; and the extended jurisdiction under which the present civil bill and similar civil-bill ejectments on title are brought, has a more direct dependence upon the first section of the Act of 1874, which amended and enlarged the jurisdiction given by the preceding Acts, as explained by the 54th section of the County Officers and Courts Act of 1877. In view of the history of this jurisdiction, referable to a succession of statutes from 1836 to 1877 all in *pari materiâ*, I cannot help thinking that it is a far-fetched notion to attribute such special force or significance to the date of the Civil Bill Act of 1851.

Much reliance was placed by defendant's counsel on sect. 133 of the Civil Bill Act of 1851, which provides that decrees and dismisses shall, if there be no appeal, be "*absolutely final to all intents and purposes*, and shall not be subject to be removed by any writ of error or otherwise to any other of Her Majesty's Courts or capable of being reversed." Defendant's counsel argued that this section has the effect of making a dismiss in ejectment a conclusive bar to subsequent proceedings. But the contrary was decided by

(1) 7 Ir. Jur. (O. S.) 127.

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the Court of Queen's Bench in 1858, in *Coneys* v. *Coneys* (1). In the course of his judgment in that case Monahan, C.J., said, at p. 385:—"The much more serious question, however, remains, whether the defendant is entitled to rely on the proceedings in the Civil Bill Court, and on the appeal therefrom, as a bar to the present ejectment. Defendant's counsel relied on the 133rd section of the Civil Bill Act (14 & 15 Vict. c. 57) . . . and he insists that the effect of the section is to render the decree of the Assistant Barrister or Judge a conclusive bar to the present ejectment. We, however, cannot adopt that argument; we do not think that such is the construction of the section referred to; the effect of the section is merely to render the decree final in the suit, and incapable of being reversed by any direct proceedings for that purpose; and the effect of the decree of the Assistant Barrister in other and collateral proceedings must depend on the provisions of the Act, and the effect given by the Common Law to the judgment of Courts of Justice." In that case Monahan, C.J., was delivering the judgment of a strong Court which included Christian, J. We are bound by the interpretation put upon the section a few years after it became law, by a decision of the Court of Queen's Bench, which has not, as far as I know, been overruled.

Counsel for defendant also placed reliance upon the occurrence of the words "on the merits" in the dismiss in the present case. As this point arises on the form of the dismiss, a reference to the statutory forms is allowable. Section 111 of the Civil Bill Act, 1851, empowered the Assistant Barrister to dismiss any case "either without prejudice to the plaintiff's proceeding by a new civil bill, or on the merits, as he shall think just." In the schedule to that Act there was only one form of dismiss for all civil bills. But after the jurisdiction in ejectment on title became established by the operation of sect. 1 of the Act of 1874, as explained by sect. 54 of the Act of 1877, two forms of dismiss were prescribed, represented by forms 31 and 32, to be found at pages 1231 and 1232 of Mr. Carleton's book. Form 31 provides for dismisses in ordinary cases, and the form indicates that the dismiss may be

(1) 8 Ir. C. L. R. 379.

either without prejudice or on the merits. Form 32 is the form prescribed for dismisses in ejectment, and in form 32 the reference to the words "without prejudice" and "on the merits" is omitted. Apparently it was recognised by those who prepared these forms that the provision enabling a civil bill to be dismissed either "on the merits" or "without prejudice" had no meaning in connection with dismisses in ejectment on title, and was not applicable to them. The addition of the words "on the merits" may serve to indicate that the Court intended its decision to be final between the parties. Even if the Court had such an intention, how could it have the effect of altering the character of the action of ejectment, or of enlarging the scope of the dismiss, so as to convert it into a conclusive declaration of the defendant's title?

For all these reasons I concur in the judgment of the Court. I need hardly add that our decision is limited to judgments in ejectment on title. Other principles are applicable to other classes of ejectments, *e. g.* ejectments for non-payment of rent. The rules as to estoppel in regard to judgments in actions of ejectment for non-payment of rent, and the reasons for them, are outside the scope of the arguments and decision in the present case, and depend upon quite different considerations.

WRIGHT, J.:—

I entirely concur in the conclusion arrived at, and for the reasons mentioned in the judgment of the Lord Chief Baron. I have only a few words to add. It certainly came on me with great surprise that this question should be agitated. I have never in my experience seen an ejectment dismiss "on the merits," and, in my opinion, such a dismiss is entirely inappropriate, and is improperly used in a civil-bill ejectment of any kind. I have looked at the forms in the schedule annexed to the 14th & 15th Vict. c. 57, and referred to by sect. 110; they will be found to be decrees and dismisses in ordinary actions, and it appears to me that to apply the provision at the end of sect. 111 to a dismiss in ejectment, and call it either without prejudice or on the merits, is erroneous.

In the present case a former civil-bill ejectment on the title

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had been brought in the year 1896, before the County Court Judge of Louth, between the same parties, founded on the same title, and for the recovery of the same lands, and had been dismissed; and, possibly *per incuriam*, but, at all events, I think wrongly, there crept into the dismiss then granted the words "on the merits." These words cannot, in my opinion, add to the force of the dismiss. I agree that sect. 133 of 14 & 15 Vict. c. 57, applies to an ejectment as well as to other cases; a dismiss in ejectment is final and conclusive, subject to appeal. But what does it conclude, and what is its finality? It declares that the plaintiff on a certain day failed to prove his case, that is, his right to recover certain lands. That implies in itself that the same plaintiff, subject to the penalty imposed not only in the Superior Courts, but in the Civil Bill Courts, by rules of Court, of lodging the costs of the former proceedings, can bring a new ejectment the next day to recover the same premises.

With reference to the case of *O'Donnell* v. *Ryan* (1), which was decided in the year 1850, under the Process and Practice Act (13 Vict. c. 18), that case was decided on two grounds: first, that by the Process and Practice Act, fictitious parties were abolished, and the real parties were before the Court; secondly, that by that Act the action of ejectment was assimilated to an ordinary personal action. Richards, B., in his judgment considered that the effect of the Act was to give to a judgment in ejectment the same effect as a judgment in an action to recover a personal chattel. The Lord Chief Baron informs us that that decision was never approved of or assented to by the profession. It was never appealed from, but the effect of the decision was soon got rid of by the Common Law Procedure Act, 1856, by sect. 94 of which the effect of a judgment in ejectment was declared to be the same as it was prior to the passing of the Process and Practice Act (13 & 14 Vict. c. 18), viz. that a judgment for the defendant in ejectment decided nothing more than that the plaintiff had failed in that action to recover possession. The following section (sect. 95) imposes on an unsuccessful plaintiff bringing a second action of ejectment the liability to give security for the costs of such second

(1) 7 Ir. Jur. (O. S.) 127.

action. I am accordingly of opinion, if it is open to me to question *O'Donnell* v. *Ryan* (1), that it was wrongly decided, and further, that it did not refer to or deal with the law of the Civil-bill Code, prior to 14 & 15 Vict. c. 57—an Act which, as the Lord Chief Baron has pointed out, is an Act to consolidate and amend the laws relating to civil bills, and is a re-enactment of the prior Civil-bill Acts.

I am of opinion that the true form of dismiss in a civil-bill ejectment is neither "without prejudice" nor "on the merits," but a dismiss *simpliciter*, and it follows that such dismiss does not declare that the plaintiff has not a title, but only shows that he has failed to prove his right to the possession. Accordingly, I think that the question reserved should be answered in the negative.

Solicitor for the plaintiff: *Charles MacMahon.*
Solicitor for the defendant: *Robert Dickie.*

J. G. T.

GRACEY, APPELLANT; BANBRIDGE URBAN DISTRICT COUNCIL, RESPONDENTS (2).

Tolls—Markets—Agreement to sell goods then outside market limits, followed by delivery within limits—Markets and Fairs Clauses Act, 1847 (10 *Vict. c.* 14), *s.* 13.

Section 13 of the Markets and Fairs Clauses Act, 1847, imposes a penalty on every person selling, or exposing for sale, within the limits of a market, except in his own dwelling-house or shop, any tollable articles.

G. was charged on summons with having sold, or exposed for sale, on the 13th June, 1904, within the limits of a market, a quantity of potatoes, which were tollable articles. It appeared that on the 9th June G. had agreed with M., within the limits of the market, to supply him with 1 cwt. of potatoes, no price being agreed on. The potatoes were not at the time within the limits of the market, but were delivered within such limits on the 13th June:—

Held, that G. was not guilty of an offence within the section.

(1) 7 Ir. Jur. (O. S.) 127.

(2) Before LORD O'BRIEN, L.C.J., and GIBSON and MADDEN, JJ.

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GRACEY *v.* BANBRIDGE U. D. C.

CASE STATED under 20 & 21 Vict. c. 43.

The material facts as set out in the case were as follows:—

The appellant was charged on summons before the Justices at Petty Sessions for that, on the 13th June, 1904, at Banbridge, in the county of Down, he, not being a licensed hawker, did unlawfully sell, or expose for sale, on the public street, a quantity of potatoes in respect of which tolls were authorised to be taken, contrary to the statute. At the hearing of the complaint it was proved on the part of the complainants, the Banbridge Urban District Council, that on the 13th June, 1904, the appellant delivered a quantity of potatoes at the house of one John M'Knight, in the town of Banbridge, without having previously paid the toll for the same, within the prescribed limits of the market of the town of Banbridge, of which the complainants were proprietors. It was proved, on the part of the appellant, that on June fair-day, viz. the 9th June, 1904, the appellant agreed with the said John M'Knight, in the town of Banbridge, within the said prescribed limits, to supply him with 1 cwt. of potatoes, but no price was agreed upon; that the appellant on the 13th June, 1904, delivered to the said John M'Knight 1 cwt. of potatoes, pursuant to the said agreement, and that the price was not yet agreed upon or paid. It was assumed that on the 9th June, 1904, the said potatoes were not within the prescribed limits of the Banbridge market, and that there was no sale by sample.

It was contended before the Justices, on the part of the appellant, that the potatoes at the time of sale were not substantially within the prescribed limits, and that if without the limits they were not there by fraud, and the appellant did not obtain the benefit of the market; that the appellant was a farmer living without the prescribed limits; that there was no sale, or exposure for sale, within the prescribed limits; that the appellant did not call with the potatoes on the person who received the same for the purpose of obtaining orders for them, but for the purpose of delivering them pursuant to a previous order; and that the person who received the potatoes on the date mentioned in the summons had ordered the same from the appellant some days previous to the delivery, without seeing any potatoes or any sample of them; and that no price was

fixed for the potatoes, and no money had as yet been paid for them.

The Justices found as a fact that the sale did take place within the town of Banbridge, and that consequently the appellant had committed an offence under section 13 of the Fairs and Markets Clauses Act, 1847, and they convicted and fined the appellant. The judgment of the Court was now required as to whether the Justices were correct in point of law in their determination.

Charles Murphy (with him *Harrison, K.C.*), for the appellant:—

The section is a penal one, and must be construed strictly. The words "other than a licensed hawker" show that it was not intended to apply to a case of this kind, but contemplated a complete sale and delivery as one transaction. To bring the case within the section the goods at the time of the sale must be within the prescribed limits of the market: *Town Commissioners of Newtownards* v. *Woods* (1). We contend that the sale here was on the 9th June, the date when the agreement was made, at which time the potatoes were outside the limits. To constitute a sale within the section, transmutation of property is not necessary, an agreement to sell is sufficient: *Stretch* v. *White* (2); *Pletts* v. *Campbell* (3). At all events there was a completed sale the moment the appellant put the potatoes in his cart, with a view to bringing them in to the buyer. The case of *The Mayor of Exeter* v. *Heaman* (4) is distinguishable. It arose upon a special Act which provided that delivery of any tollable goods should in all cases be evidence of the sale thereof. *Torquay Market Company* v. *Burridge* (5) was also a decision upon a special Act, and *Mayor of Exeter* v. *Heaman* (4) was reluctantly followed.

Edward Cuming and *Chambers, K.C.* (with them *Williamson*), for the respondents:—

Assuming the true construction of the section to be that to constitute an offence the goods must be within the limits of

(1) I. R. 11 C. L. 506.
(2) 25 J. P. 485.
(3) [1895] 2 Q. B. 229.
(4) 37 L. T. (N. S.) 534.
(5) 48 J. P. 71.

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the market at the time of sale, such condition is fulfilled in the present case, inasmuch as the sale took place on the 13th June, when the potatoes were delivered in Banbridge. What took place on the 9th June was mere negotiation, not binding on either party; there was no sale of any specific goods. There is no sale until the property is transferred from the seller to the buyer; when the transfer of the property is to take place at a future time, that is merely an agreement to sell: Sale of Goods Act, 1893, section 1, sub-sect. 3. In the present case there was no transfer of property until the potatoes were delivered to the buyer in Banbridge on the 13th June: *Pletts* v. *Campbell* (1). In *Pletts* v. *Beattie* (2) it was held that there was a complete sale at the brewery, but in that case the brewers had express authority to appropriate goods to the order; there is no evidence of any authority to appropriate in the present case. *Town Commissioners of Newtownards* v. *Woods* (3) is distinguishable. There was there an agreement for sale on the 7th April, 1877, the goods then being outside the market limits, followed by a delivery within the limits the next week. The offence charged in the summons was a sale on the 7th April, and the decision was that, as on that date the goods were not within the limits, the case did not come within the section.

Harrison, K.C., in reply:—

In *Town Commissioners of Newtownards* v. *Woods* (3) the contention of the counsel for the commissioners was that a sale by sample, followed by delivery of the bulk within the limits of the market, constituted an offence within the section. If the Court had been of opinion that an offence was committed when the goods were subsequently delivered, they no doubt would have allowed the summons to be amended. *Pletts* v. *Campbell* (1) was a decision under the Licensing Acts; and Wills, J., there points out the danger of applying to cases arising under such Acts decisions such as *Stretch* v. *White* (4), arising on another statute.

Cur. adv. vult.

(1) [1895] 2 Q. B. 229.
(2) [1896] 1 Q. B. 519.
(3) I. R. 11 C. L. 506.
(4) 25 J. P. 485.

LORD O'BRIEN, L.C.J. :—

This case raises a question under the 13th section of the Markets and Fairs Clauses Act, 1847. It appears that the appellant, Gracey, was charged before the magistrates on summons for that, on the 13th June, 1904, he, "not being a licensed hawker, did, at Banbridge, unlawfully sell or expose for sale on the public street a quantity of potatoes in respect of which tolls are authorized to be taken, contrary to the statute." The magistrates made an order convicting the appellant, and imposing a fine of 5*s.* with costs. The appellant says that on the facts this order is wrong, and that he should have been acquitted, inasmuch as the case is not within the Act. It appears that Gracey came into Banbridge and went into a shop, and that while there the shopkeeper gave him an order for 1 cwt. of potatoes. Gracey had not the potatoes within the prescribed limits of the market on that day. The facts proved before the magistrates were as follows :—[His Lordship read from the case stated the facts proved, as set out *ante*, p. 210.]

Thus there was an agreement on the 9th June to supply 1 cwt. of potatoes. The price was not fixed, but the transaction was in substance a sale of 1 cwt. of potatoes at a reasonable price, the potatoes to be reasonably fit for the purpose for which they were sold. The potatoes were not delivered until the 13th June. The magistrates held that there was a sale within the limits of the market, and convicted Gracey. What are the words of section 13 of the Act? "After the Market-place is opened for public use every person, other than a licensed hawker, who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special Act authorized to be taken in the market, shall, for every such offence, be liable to a penalty not exceeding forty shillings." In my opinion the words "who shall sell" are not to be construed according to their strict legal meaning. I entirely agree with the opinion expressed by Blackburn, J., in *Stretch* v. *White* (1), that it is not necessary, to constitute a sale within the 13th section, that there should have been a transmu-

(1) 25 J. P. 485.

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tation of property, and with the opinion expressed by Wright, J., in *Pletts* v. *Campbell* (1), that there need not be a sale in the strict legal sense. Here the contract for sale, and I think the substance of the transaction, took place on the 9th, and this being so, I think that the *Newtownards Case* (2) applies, with the judgment in which I entirely concur. It was there held that inasmuch as the bulk of the subject-matter was not within the prescribed limits at the date of the sale, the person charged was not liable to conviction. Having regard, therefore, to the construction which I think should be put upon the words "who shall sell," and to the *Newtownards Case* (2), I am of opinion that the magistrates here were wrong, and that the appellant was entitled to be acquitted.

GIBSON, J.:—

Banbridge is a town to which 10 Vict. c. 14, applies, and the question for our decision is whether a valid contract of sale made in the town, in respect of certain unascertained goods situate outside the town, the property in which afterwards passed by delivery within the town, falls within section 13. The goods were not appropriated so as to pass before delivery; they remained under the dominion of the seller, and were delivered by him. The entire cause of action for goods sold arose within the town. The summons is founded on the delivery on June 13th, which is treated as the day of sale.

There was certainly no exposure for sale. Was there a sale? The contract was made on the 9th June, and completed by delivery on the 13th. The completed sale consisted of two parts—the bargain, and subsequent acceptance of the goods. It is settled that to bring a case within the section the bulk must be within the prescribed limits at the time of sale. Where the transaction is entire, as, for instance, the sale of a specific chattel situate outside the limits, or of goods similarly situated the property in which passes by appropriation outside such limits, there is no difficulty. Where the transaction is divisible into stages, what is the principle? It seems inadmissible to treat the delivery

(1) [1895] 2 Q. B. 229. (2) I. R. 11 C. L. 506.

under a valid antecedent contract as *per se* constituting the sale. The sale covers two stages, and an essential part is the contract without which the goods would not have been brought to Banbridge at all. If the goods had been appropriated before delivery in Banbridge, there could have been no right to toll. But appropriation is not the contract, it is an act done under the contract. The delivery and acceptance on the 13th were not the sale; they were the completion of a previous contract. As the goods were not in Banbridge when the bargain was made, there is not such a sale as the Act contemplates. It may be said that this might enable an ingenious vendor to avoid toll. There was here no such intention, if that would make any difference: *Mayor of Brecon* v. *Edwards* (1). If the complainants are right, distant vendors sending goods contracted to be sold might be made liable.

I have dealt with the case on principle. The *Newtownards Case* (2) and *Stretch* v. *White* (3) are authorities supporting my conclusion. The *Exeter Case* (4) and the *Torquay Case* (5), deciding that a sale under an antecedent contract may be deemed to have taken place on the day of delivery and to make the seller liable to toll, were decided on special statutes. If they cannot be so distinguished, I prefer the reasoning in the *Newtownards Case* (2) and *Stretch's Case* (3). The decision in the latter case cannot be explained as founded on an appropriation of the goods outside the market limits; no such idea occurred to the Judges, and the facts do not support any inference of appropriation. I do not deem it necessary to consider the cases as to sales under the Licensing Act, which proceed on the policy of the Act and different considerations. "Sell" in section 13 means sell a bulk present in the market limits, and the Court ought not to be astute by technical reasoning to extend tolls to cases where, according to common understanding, the goods were not so present when the effective sale was made. The liability to toll should not vary according as the contract was for sale of a specific chattel or unascertained goods, or according to appropriation or non-appropriation of such goods.

(1) 1 H. & C. 51. (2) I. R. 11 C. L. 506. (3) 25 J. P. 485.
(4) 37 L. T. (N. S.) 534. (5) 48 J. P. 71.

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MADDEN, J. :—

In my opinion the principle of the decision of the Court of Common Pleas in *The Commissioners of Newtownards* v. *Woods* (1) applies to the present case. The offence created by 10 Vict. c. 14, sect. 13, is selling, or exposing for sale, tollable articles in a market town elsewhere than in the appointed market-place. The Court of Common Pleas held, in the words of Morris, C.J., "That to bring the case within the 13th section, the bulk of the article sold must be substantially within the prescribed limits at the time of the sale."

What then was the time of sale in the present case? If the 9th of June, the bulk was not then within the prescribed limits, and no offence was committed. If the 13th, when the potatoes were delivered, a different result will follow.

If this question is to be answered according to the niceties of the law of sale, there was no transfer of property on the 9th, and, therefore, no completed sale until the 13th of June. But I decline to import into the consideration of this case the niceties of the law relating to a completed sale of goods, as distinguished from the contract, which is in popular language often called the sale. For this I have the authority of the Judges who decided the case, which is most strongly relied on as an authority for the application of those niceties to the construction of the statute before us. I am simply adopting the suggestion of Wills, J., in dealing with a similar class of case. In the same case Wright, J., observed—"I think it is going too far to say that the word 'sell' must necessarily mean a sale in the legal sense; it may be satisfied by an agreement to sell, of which *Stretch* v. *White* (2) is an illustration": *Pletts* v. *Campbell* (3).

In the same case Wills, J., when pressed with the authority of *Stretch* v. *White* (2), observed—"It is very often very fallacious to apply decisions under one statute to cases arising under another." I apply this observation, with which I entirely concur, to the cases decided in England under the Exeter and Torquay Market Acts. The exact terms of the latter Act are not set out in the short note

(1) I. R. 11 C. L. 506. (2) 25 J. P. 485. (3) [1895] 2 Q. B. 229.

of the case in the Justice of the Peace (1). But as the decision in the *Exeter Case* (2) was reluctantly followed in the *Torquay Case* (1), on the ground that the two cases were undistinguishable, I conclude that the Acts were similar in their terms. The 11th section of the Exeter Act provided that delivery of any tollable goods should, in all cases, be evidence of the sale of the goods. The Court, under circumstances similar to those in the present case, held that sufficient took place on the date of delivery to constitute the offence of selling or exposing for sale under the provision of the Exeter Market Act. It may be fairly contended that delivery is the essential element of a sale under this Act, having regard to the provisions of the 11th section.

But if I have to choose between the English cases and the decision of our Court of Common Pleas, I follow the latter, not only because I am bound to do so, but because it embodies my own opinion. I do not interpret the word "sale" by the niceties of the law of completion, but in view of the kind of mischief which the statute was obviously passed to prevent, and in view of the inconvenience of holding that a trader in a market town could not buy goods on order for retail selling, without paying toll. No doubt the prosecution in that case was for selling on the earlier date. But the Court, with all the facts before it, held that no offence against the Act was disclosed; and I conclude that if the facts in that case had been the same as in the case before us, the decision would have been the same.

Solicitor for the appellant: *T. B. Wallace.*
Solicitor for the respondents: *A. M'Clelland.*

J. G. T.

(1) 48 J. P. 71. (2) 37 L. T. (N. S.) 534.

Appeal.
1904.

THE ATTORNEY-GENERAL *v.* JAMESON (1).

Nov. 21–23.
Dec. 19.

Revenue—Estate duty—Shares—Company—Articles of association—Restrictions on transfer—Right of pre-emption—Principle of valuation—Sale in open market—Property passing on death—Repugnancy—Rule against perpetuity—Companies Act, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 16—*Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 1, 2, 3, 5; 7, *sub-s.* 5; 13, 22 (*b*).

By will, dated the 26th July, 1901, a testator devised all the residue of his property to his executors upon trust, to pay the interest of one-sixth part thereof to each of five of the testator's sons and daughters, respectively, for life; and of the remaining one-sixth part, to such of the children of a deceased daughter as should then be living, in equal shares; and he directed that, subject to the said life estates, his trustees should hold the said respective sixth-parts or shares (save as to the share of one daughter, which, after her death, was to be held in trust for the remaining residuary legatees) upon trust, for such person or persons as the parties respectively entitled to a life interest in the said shares might by deed or will appoint. The testator died on the 15th September, 1901, and the said will was duly proved by the three executors therein named. The residuary estate of the testator included 750 fully paid-up shares in the firm of J. J. & Son, Ltd., a Company registered on the 9th October, 1891, under the Joint Stock Companies Acts, dividends upon which had been paid by the Company for some years previously to the testator's death at the rate of 20 per cent. per annum. The articles of association of the Company contained an elaborate series of provisions relating to the registration of holders and to the alienation of shares in the Company, whereby it was (*inter alia*) provided that any member proposing to transfer a share should serve a "transfer notice" upon the Company (who were not bound to recognise any equitable claim to a share) of his intention to transfer, which notice constituted the Company his agent for the sale of the share to any member at the "fair value thereof," the latter being defined as a sum of £100, or such other sum as should from time to time be fixed as the "fair value" by resolution of the Company in general meeting. No share could, save as therein provided, be transferred to a non-member so long as any member was willing to purchase the same at the "fair value," the directors being empowered to refuse to register any transfer to a non-member of whom they did not approve, such transfer being void. Upon the Company,

(1) Before Lord Ashbourne, C., and Fitz Gibbon, Walker, and Holmes, L.JJ.

within twenty-eight days after the service of "the transfer notice," finding a member willing to purchase, the retiring member was bound, upon the payment of the "fair value," to transfer the share to the purchasing member, in default of which the Company might receive the purchase-money and enter the name of the purchasing member in the register as the holder of the share. In the event of the Company not finding a purchaser within the twenty-eight days specified, the retiring member might, within three months, sell and transfer the share to any person, subject to the approval of the directors, and at any price. It was provided that the executors or administrators of a deceased member should be the only persons recognised by the Company as having any title to the shares registered in the name of such member, and that any person becoming entitled to a share in consequence of the death of any member might, subject to the regulations contained in the articles, transfer such share to himself or any other person; the executors of a deceased member being further empowered, subject to the approval of the directors, to transfer the share of such member to his son or brother, or to any son or brother of any existing member. Upon the death of the testator the executors paid for estate duty in respect of the said 750 shares a sum calculated on the basis that the value thereof was, having regard to the right of pre-emption and restrictions on transfer and sale contained in the articles, limited to the "fair value" of each share fixed by the articles at £100, and refused to pay any further duty. On an information by the Attorney-General, seeking a declaration that on the death of the testator estate duty became payable, under the Finance Act, 1894, upon the principal value of the said shares, being the price which same would fetch if sold in the open market at the time of the testator's death, and that such value was not limited to the "fair value" of £100 a share, or for the determination of the manner in which such value was to be ascertained:—

Held, by the Court of Appeal, varying the order of the King's Bench Division (reported [1904] 2 I. R. 644), that the principal value of the shares ought to be estimated at the price which, in the opinion of the Commissioners of Inland Revenue, they would fetch if sold in the open market on the terms that the purchaser should be entitled to be registered and should be registered as the holder of the shares, and should take and hold them subject to the articles of association, including the articles relating to the alienation and transfer of the shares of the Company.

APPEAL by the Attorney-General from the decision of the King's Bench Division, reported *ante*, [1904] 2 I. R. 644, where the facts are stated.

The Right Hon. the Attorney-General, the Solicitor-General, and *Coll*, for the appellant.

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Ronan, K.C., Matheson, K.C., and *Brunskill,* for the respondents.

The arguments were the same as in the Court below.

Cur. adv. vult.

Dec. 19.

LORD ASHBOURNE, C.:—

This is an appeal from the King's Bench Division on an information by the Attorney-General, and raises important questions on the construction of the Finance Act, 1894.

The object of the suit is to obtain declarations as to the amount of the liability of the personal estate of the late Henry Jameson for estate duty in respect of 750 shares held by him in the well-known firm of John Jameson & Son, Limited.

The Finance Act provides (sect. 7) that the Commissioners shall themselves estimate the price which, in their opinion, the property would fetch if sold in the open market; and that, subject to the provisions of the Act, the value of any property for the purpose of estate duty shall be ascertained by the Commissioners in such manner and by such means as they think fit; and they may employ a valuer for the purpose. An appeal to the High Court is also given by sect. 10 to any person aggrieved by the decision of the Commissioners.

I mention these provisions at the outset to draw attention to the fact that the Commissioners have never yet estimated the value or employed a valuer, and this case is not an appeal by a person aggrieved by their estimate, none having been made. It comes before us on an information by the Attorney-General seeking for a declaration—not fixing the price or value—but which may guide or assist the Commissioners in the performance of their clear statutable duties.

I cannot but think the method adopted somewhat inconvenient; but as the case is now before us, I will give my opinion on the various matters dealt with in the judgment now under review, and in the arguments addressed to us.

The facts of the case are sufficiently clear. Henry Jameson by his will, dated 26th July, 1901, appointed his two nephews, the defendants John Jameson and George Jameson (both then and

now members of the Company), and his son-in-law, William Robertson, to be his executors, leaving to them all his property upon trust for his children.

Henry Jameson died on the 15th September, 1901, and his said will was duly proved by his aforesaid executors on 19th November, 1901. The defendants paid to the Commissioners of Inland Revenue £7243 6*s.* 4*d.* for estate duty in respect of personal property. Part of the testator's personal estate at his death consisted of the aforesaid 750 shares, portion of the sum of 4500 shares of £100 each which represented the capital of the Company.

The articles of association of the Company contained (*inter alia*) the following provisions relating to the registration of the holders, and to the alienation of shares in the Company:—

5. The Company shall be entitled to treat the registered holder of any share as the absolute owner thereof, and shall not be bound to recognise any equitable or other claim to or interest in such share on the part of any other person save as herein provided.

6. A share may be transferred or bequeathed to any person who is already a member, but no share shall, save as hereafter provided, be transferred to a person who is not a member so long as any member is willing to purchase the same at the fair value.

7. In order to ascertain whether any member is willing to purchase a share, the person, whether a member of the Company or not, proposing to transfer the same (hereinafter called the retiring member) shall give notice in writing (hereinafter called the transfer notice) to the Company that he desires to transfer the same. Such notice shall constitute the Company his agent for the sale of the share to any member of the Company at the fair value. The transfer notice may include several shares, and in such case shall operate as if it were a separate notice in respect of each. The transfer notice shall not be revocable, except with the sanction of the directors.

8. If the Company shall within twenty-eight days after being served with such notice, find a member willing to purchase the share (hereinafter called the purchasing member), and shall give notice thereof to the retiring member, he shall be bound upon payment of the fair value to transfer the share to the purchasing member.

9. The fair value of a share shall be £100, or such other sum as shall from time to time be fixed as the fair value by resolution of the Company in general meeting.

. . . . . .

11. If the Company shall not, within twenty eight days after being served

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with the transfer notice, find a member willing to purchase the share, and give notice in manner aforesaid, the retiring member shall, at any time within three months afterwards, be at liberty, subject to clause 31 hereof, to sell and transfer the shares (or those not placed) to any person (subject to the approval of the directors), and at any price.

. . . . . .

16. The executors or administrators of a deceased member (not being one of several joint-holders), shall be the only persons recognised by the Company as having any title to the shares registered in the name of such member; and in case of the death of any one or more of the joint-holders of any share the survivors shall be the only persons recognised by the Company as having any title to or interest in such share.

17. Subject to the approval of the directors, any committee of a lunatic member, and any person becoming entitled to a share in consequence of the death of any member, upon producing such evidence that he sustains the character in respect of which he proposes to act under this clause, or of his title, as the directors think sufficient, may, subject to the regulations herein contained, transfer such shares to himself or to any other person.

18. Subject to the approval of the directors, any share may be transferred by a member to any son or brother of any existing member, and any share of a deceased member may be transferred by his executors or administrators to any son or brother of such deceased member, or to any son or brother of any existing member.

. . . . . .

20. The directors may refuse to register any transfer of a share where the Company has a lien on the share, or to a transferee not being already a member of whom they do not approve.

. . . . . .

22. If any person not being already a member shall have become entitled (either on producing evidence that he sustains any particular character, or without producing such evidence) to transfer a share to himself either alone or in conjunction with any other person, whether already a member or not, the directors may give notice to such person that they decline to admit him as a member, and thereupon the Company shall be deemed to have been served with a transfer notice in respect of such share.

23. A transfer made to any person not being already a member, of whom the directors shall not approve, shall be void.

The dividends paid by the Company on these shares for several years previous to the testator's death were at the rate of 20 per cent. per annum.

The defendants John Jameson and George Jameson (who were already shareholders in their own right) were registered as

shareholders in the books of the Company in respect of the said 750 shares.

Under these circumstances the Attorney-General, on behalf of His Majesty, filed an information praying:—That it may be declared that upon the death of the said Henry Jameson, estate duty became payable under the provisions of the Finance Act, 1894, upon the principal value of the said 750 shares in the said Company, being the price which same would fetch if sold in the open market at the time of the death of the deceased, and that such value is not limited to the "fair value" of £100 a share, notwithstanding the special provisions as to the "fair value," and as to the alienation of the shares of the said Company contained in the said articles of association, or that it may be determined in what manner such value is to be ascertained, and what is the principal value of such shares for the purposes of the said Act. An account was also prayed for.

The defendants, in the defence, urged that the value of the 750 shares was for the purposes of estate duty necessarily the same as the "fair value" fixed by the articles of association; that the right of pre-emption and restrictions on transfer and sale in the case of such shares cannot be treated as non-existent in arriving at the value of the shares for the purpose of estate duty, and, having regard to all these considerations, the defendants say that the principal value of the shares, being the price which same would fetch in the open market, was not greater than the "fair value," as fixed by the articles of association. The defendants also submitted that the Commissioners should have properly assessed what in their opinion would be the price which the shares would fetch if sold in the open market at the time of the death of the deceased, and should have demanded from the defendants the estate duty payable in respect thereof, and then the defendants, if dissatisfied, would have had the right of appeal to the High Court under section 10 of the Finance Act, 1894.

When the case came before the King's Bench Division, Mr. Justice Kenny and Mr. Justice Boyd gave judgment for the defendants, while the Lord Chief Baron was more in favour of the Crown contention, and the Attorney-General has appealed.

The case is of the highest importance, and is not free from

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difficulty. It would appear that no similar case under the Finance Act has as yet come before the Courts, and we have been pressed by the defendants' counsel that if the words of the Act are doubtful, or uncertain, or incomplete, we should steadily bear in mind that in the case of a statute imposing a tax, we should adopt a construction favourable to the subject unless it is clear that he comes within the letter of the law. This rule is clearly enunciated in the cases of *Partington* v. *The Attorney-General* (1), and the *Oriental Banking Company* v. *Wright* (2).

The Finance Act of 1894 enacts that estate duty shall be levied and paid upon the principal value of all property which passes on the death of any person dying after 1894 (section 1), of which the deceased was competent to dispose (sections 2 and 6), and that the principal value is to be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased (section 7, (5)).

What is the meaning of this enactment as sought to be applied to Henry Jameson's 750 shares? The Court has no power to ascertain the principal value. The Commissioners have formed no estimate, and expressed no opinion. The Attorney-General has filed the information practically to obtain a declaration that the estimate of the defendants is wrong, that the payment already made is insufficient, and that the "fair value" is to be disregarded, and this for the guidance of the Commissioners who have not as yet performed their statutory duty. The course taken by the Crown compels us to consider with care in reference to these 750 shares what passed on the death of Henry Jameson. The only possible answer that can, in my opinion, be given is—the entire property in the shares, so far as he was competent to dispose of them at the time of his death. He was only competent under and pursuant to the articles of association. These articles defined and circumscribed his powers. At the time of his death he was not competent to dispose of the shares without complying with those articles. The articles also prescribed the position of his executors in reference to his shares. Can it for a moment be

(1) L. R. 4 H. L. 100. (2) 5 A. C. 842.

suggested that the shares were one thing in the hands of Henry Jameson, and something else in the hands of his executors? Surely there must be the same subject-matter before and after death.

This was a private Company framed with all the pride of success by the Jameson family. Their absolute *bona fides* is admitted. The idea of *doing* the Revenue or creditors never crossed the minds of the founders. If there was any idea of fraud, the Court would be strong enough to refuse to be bound by the articles, as in the cases of *Wilson* v. *Greenwood* (1) and *Collins* v. *Barker* (2). The general scope of the articles was that there should be in the Company, if it were so desired, none but members of the Jameson family. The articles were frankly directed to this end.

The answer to this claimed obligation made by the Crown is that some of the articles are invalid and void. But which of the articles are invalid, and why? The Crown does not come to close quarters on the question. The case was not made in the information. There is no repugnancy in the articles. The owners are given a regulated and controlled freedom of disposition. The suggestion of perpetuity was only faintly hinted at. The bankruptcy contention was indeed suggested by the Attorney-General, but was met by a convincing argument on the articles of association, and the facts of the case. The defendants also relied on *Borland's Case* (3), which, however, was far stronger than the present, and I do not deem it necessary to discuss this bankruptcy point. I see nothing to induce me to set aside or disparage any of the articles in the Jameson Company on any of the grounds put forward by the Crown. Therefore, I take the case to be that the executor took on his death the same subject-matter which Henry Jameson owned in his lifetime, and was at his death competent to dispose of, *i.e.* the 750 shares in the Jameson Company, subject to and controlled by its articles of association. To hold otherwise would be to say that the shares were more valuable in the hands of his executors than in the hands of Henry Jameson, that he was fettered while they were free—that the articles bound him and could not control them. He

(1) 1 Swanst. 471. (2) [1893] 1 Ch. 579. (3) [1901] 1 Ch. 279.

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deliberately became a shareholder in this family Company with its articles and its contracts, and his shares cannot be considered apart from this contractual position. The share cannot be split up and considered apart from its contractual incidents. The articles are part and parcel of the share, and not collateral and separable. He must be assumed to have absolutely bound himself to obey and conform to the articles.

I am unable to see that the provisions as to pre-emption and "fair value" can be ignored and put aside as separate. They must be faced and dealt with as reasonable methods honestly adopted by this Company for the safeguarding of the continuance of the Jameson interest in this Jameson Company.

The 9th article gave power to vary the "fair price" from time to time, and that it has not been varied may have been the considered action of the shareholders having regard to the uncertainties of commerce, and the common interest of the shareholders. The defendants resolutely contend, having regard to the circumstances and the facts, and the articles, that the "fair value" is really the soundest way to gauge the price as if the share was sold in the open market.

But these observations are really preliminary to considering the effect of the Finance Act, 1894. How can such shares in such a Company with such articles have their value estimated at the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market? An actual sale in open market is out of the question. A feat of imagination has to be performed. Two suggestions have been put forward in argument. The Attorney-General says that the Commissioners should assume an unfettered sale in the open market to the highest bidder, who would be free from the clogs on alienation contained in the articles. The defendants, on the other hand, contend that the Finance Act is satisfied by taking the par or "fair value" of £100 per share as the capital value which the Commissioners should estimate as the price which the shares would fetch if sold in the open market. Each side rushes into an indefensible extreme. The argument of the Attorney-General, which seeks to brush aside the articles and to vest in the executors a property which Henry Jameson never possessed, would ascribe to the Finance Act the

power of making a new subject-matter. The argument of the defendants clings desperately to the articles, and gives really no adequate significance to the words of the Act requiring the Commissioners to estimate the price which the shares would fetch in the open market. The solution lies between the two. The Attorney-General must give more weight to the articles, and the defendants to the statute. It requires no tremendous imagination to conceive what a purchaser would give in the open market for Henry Jameson's shares as Henry Jameson himself held them at his death—for the right to stand in his shoes. That is, he held shares earning 20 per cent. interest with power of disposition to sons and brothers subject to, but himself possessed of the power of pre-emption; and if that power of pre-emption was not used against him—a most improbable event indeed—he might sell as he best could at any price, and to any person he could. This, although not so valuable as owning shares absolutely free and unfettered in power of disposition, was obviously much more valuable than the "fair value" of the articles. I am not a valuer or a Commissioner, but I do not see any overwhelming difficulty in estimating the price which such valuable shares would fetch if sold in the open market.

The order framed by Mr. Justice Kenny is not inconsistent with anything that I have said, although I think that my reasoning would go to suggest a higher price, and I cannot regard the order framed as giving sufficient guidance. It appears to take too narrow a view of the rights of the Crown. The Commissioners should estimate the principal value at the price which same would fetch if sold in the open market on the terms that the purchaser should take and hold them subject to the articles of association. In the result I cannot adopt the contention of either the Attorney-General or of the defendants, and I think that the order should be modified in the direction indicated; and giving no costs of the appeal to either side, we do not interfere with the costs before King's Bench Division.

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FITZ GIBBON, L.J. :—

The Finance Act, 1894, section 1, directs that estate duty shall be levied and paid upon "*the principal value*," ascertained as thereinafter provided, of all property which passed on the death of Henry Jameson. That property included his 750 ordinary shares of £100 each in John Jameson & Son, Limited. In my opinion each of these shares, with all rights and liabilities, and all advantages and disadvantages, incident to its ownership, passed on Henry Jameson's death to his executors as one indivisible piece of property. In conveyancing phraseology, the executors took each share "to hold in as full and ample a manner as the same was held by Henry Jameson at his death." The Finance Act, section 2 (1) (a), *includes* in property passing, "property of which the deceased was at the time of his death competent to dispose." In my opinion Henry Jameson was competent to dispose of his shares and of all his interest therein, within the meaning of that sub-section. In my opinion, on his death, there was no cesser of any interest in them, and no benefit in respect of them accrued or arose to any person, by any title or from any source, other than the passing of the property to his executors.

Section 7 enacts the manner of "determining the value of any estate for the purpose of estate duty." Sub-section (5) converts *value* into *price*; and enacts that "the principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased," that is to say, the price estimated to be obtainable on an assumed sale. The Commissioners have exclusive jurisdiction to estimate that price in the first instance. Section 10 (1) provides that "any person aggrieved by the amount of duty claimed by the Commissioners, on the ground of the value of any property, may appeal to the High Court, and the amount of duty shall be determined by the High Court"; with a further appeal by leave under sub-section (2).

It seems to me to be regrettable that the procedure thus provided was not followed, and that the King's Bench Division was called upon to make an interlocutory declaration, which has been

brought here upon appeal, and which, whenever or however varied here, or elsewhere, can be nothing more than a judicial paraphrase of the simple words of the Finance Act, leaving the Commissioners to do their duty under section 7 (6), with any help they can get from that paraphrase, but leaving any assessment which they might make liable to appeal; not to an interlocutory appeal raising abstract questions of interpretation and logomachy, but to a final appeal, upon which not only those questions, but the result of the correct application of right principles to the facts of the case, would be cognisable, and the only question of human interest in the whole business, namely—"How much are Henry Jameson's executors to pay for estate duty?"—could be settled.

If we are to interpret the Finance Act in advance, I cannot improve on the terms of the declaration which will be read by Holmes, L.J. But the difficulty of framing any paraphrase of which the meaning or effect will be certain, appears already from the fact that Kenny, J., and Boyd, J., agreed upon an order of which, though it directs regard to be had to the Articles of Association, Kenny, J., says that the result of his conclusion is that "it does not at all follow that the principal value of the shares in question might not exceed the gross or fair value of £100"; and, though it declares that the value is to be ascertained as on a sale in the open market, Boyd, J., says:—"With the restrictive conditions in the articles by which a purchaser of the shares would be bound, if sold in the open market, it would be folly on the part of such purchaser to give even the fair value."

In this Court the Lord Chancellor has said that he is not certain that there is anything inconsistent with our Order in the Order of the King's Bench, though none of us, I believe, accepts all that is said in either of the judgments that expounded that Order. I am far from certain that my idea of the effect of our Order is the same as that of my colleagues; and if the judgment of the Lord Chief Baron had ended with its first paragraph, or if that paragraph could now be taken as fully expressing his interpretation of the Act, I should have concurred with him. He said that "the Attorney-General was entitled to a declaration that the price should be that which, in the opinion of the Commissioners, would have been fetched if the sale in the open market were upon

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the terms that the purchaser thereat should be entitled to be, and should be registered as, a member of the Company in respect of the purchased shares." But he said further on, that it was "on the value of the right of pre-emption" that the defendants were trying to escape the liability of paying death duty, and this has been read as implying an opinion that the liability to pre-emption is to be left out of account in valuing the shares for estate duty.

The basis of my construction of the Act is the unity and indivisibility of Henry Jameson's property in the shares. I cannot adopt any procedure, or accept any solution of the question in dispute, which splits up that interest for any purpose.

In my opinion sect. 7 (5) turns "value" into "price" for the purpose of estimating its amount; that price is to be ascertained upon a sale assumed to take place "in the open market," and that means the price which would be obtainable upon a sale where it was open to everyone, who had the will and the money, to offer the price which the property of Henry Jameson in the shares was worth as he held them. The price was to be that which a purchaser would pay for the right "to stand in Henry Jameson's shoes," with good title to get into them and to remain in them, and to receive all the profits, subject to all the liabilities, of the position. The price was what the shares were worth to Henry Jameson at his death—in other words, it was what a man of means would be willing to pay for the transmigration into himself of the property which passed from H. Jameson when he died.

But that property, like all property that I know of (except, perhaps, the gold coin of the realm), has its incidents, advantageous and disadvantageous. These include the operation of the articles of association, so far as they are legal. Since the first "Companies Act," property of countless value has been created under articles of association, and has passed by transfer and on death. Since the Finance Act, it has been valued and assessed for "estate duty"; until this case, I am not aware of any attempt made by the Crown to enhance the value for the purpose of assessment above the value to the holder; but this would be the effect of estimating the value under sect. 7 (5), upon the assumption that any depreciating incidents affecting the property in the hands of

the holder while he lived were to be left out of account in determining the price which an imaginary purchaser would give for it in a supposed "open market."

The right of pre-emption against Henry Jameson's shares in certain events, if legal, is a depreciating incident; but the right of Henry Jameson, or of any person "standing in his shoes," to exercise the corresponding right of pre-emption against the other shares of the Company in the like events, is an appreciating incident, of Henry Jameson's property, which, in my opinion, is to be valued as a whole.

Restrictions upon alienation exist in many forms, and widely vary in degree. The transfer fee of half-a-crown on shares is one; a condition against alienation, making assignment of land illegal and void under the Sub-letting Acts is another. The decision of the majority of this Court in *Casey* v. *Bentley* (1) is an instance of the serious consequences which may be held to flow from an article of association which limits the transfer of shares to purchasers approved by directors. But all these things are, in their nature only so many incidents of property, affecting it alike in the hands of any one, and affecting both its value and its price.

Decisions in bankruptcy, based on public policy, and on the statutory provisions against placing property beyond the reach of creditors, are not applicable to a statute for ascertaining the value of property for the purpose of taxation.

It is impossible, at this day, to hold that the articles of J. Jameson & Son, Ltd., are illegal and void under the Finance Act, or that estate duty is to be assessed and levied upon the shares of the Company, or on any like shares, upon a principle, or an assumption, which would enhance their value for taxation when passing on death, beyond their actual value to a living owner, when depreciated by lawful restrictions upon transfer, imposed by the articles of association.

The Commissioners, when fixing the value of the property for taxation at the price which, in their opinion, it would fetch in the open market, cannot estimate that price on an assumption that the purchaser was to get, and consequently would be willing to pay

(1) [1902] 1 I. R. 376.

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for what neither Henry Jameson nor any other shareholder, past present or future, in this Company ever had or can have, viz. shares in John Jameson & Co., Ltd., freely transferable to any person whomsoever, as distinguished from shares freely transferable only to existing members of the Company, or to their sons or brothers, and liable to serious restrictions and conditions upon transfer to others.

Regretting that we cannot now hear, decide, and end the whole case, I concur in the definition of the meaning of the Finance Act which my colleagues have prepared.

I wish we could have acted upon the defendants' answer, paragraph 5—

> "The defendants will submit that the Commissioners of Inland Revenue should have properly assessed what, in their opinion would be the price which the said shares would fetch if sold in the open market at the time of the death of the deceased, and should have demanded from the defendants the estate duty payable in respect thereof, and then the defendants, if dissatisfied with the amount of such assessment, would have had the right of appeal to the High Court of Justice in Ireland, under sect. 10 of the Finance Act, 1894, and could have had the amount of duty payable by them determined by this Court on a petition, and they will submit that these proceedings are unnecessary and oppressive."

But the defendants have not relied on this submission as a defence; on the contrary, they have set up and persisted in the defence that estate duty is not assessable upon any sum greater than the value fixed by the articles of association, and that defence is, in my opinion, unsustainable.

WALKER, L.J.:—

The question raised by the information in this case is what is the estate duty payable by the executors of Henry Jameson in respect of 750 shares in the Company of John Jameson & Son, held by him at the time of his death on the 15th September, 1901?

The firm of John Jameson & Son was turned into a Limited Company in October, 1891. The capital consisted of 4500 shares having a nominal value of £100 each. Thus the

nominal capital was £450,000, and Henry Jameson held one-sixth of it at the time of his death. For a considerable time, and at the date of his death, 20 per cent. was being paid on the shares. It is obvious, therefore, apart from special circumstances connected with the shares, that they far exceeded in intrinsic value the nominal value.

But the Company, which was regulated by articles of association of October, 1891, was intended to be a private one and restricted as far as possible to members of the Jameson family, and for that purpose the articles contain elaborate provisions applicable both to existing members and executors of deceased members. A pre-emption price at what is called the "fair value" fixed (subject to revision) at £100 was named. Under the 18th clause any share may be transferred by a member, subject to the approval of the directors, to any son or brother of said member or son or brother of any existing member, and any share of a deceased member may be transferred by his executor to the same limited class; but subject to clause 18 the provision in clause 6 operates, which is "a share may be transferred or bequeathed to any person who is already a member, but no share shall be transferred to a person who is not a member so long as any member is willing to purchase the same at the fair value," and notice of transfer is required. Clause 11 of the articles provides for a case in which no member willing to purchase the share can be found. In that event "the retiring member shall" (within the time limited) "be at liberty, subject to clause 31 hereof, to sell and transfer the shares (or those not placed) to any person, subject to the approval of the directors, and at any price." This was the character of the property the subject of the information. There is also a provision limiting the general rights of assignees in bankruptcy, the validity of which I do not think it necessary to consider at all. Henry Jameson appointed as his executors John Jameson and George Jameson, both already members of the Company, and also William Robertson; and after the death of Henry Jameson, the Company registered John Jameson and George Jameson as members in respect of the 750 shares.

The Crown claimed estate duty from the executors in respect of the 750 shares. The executors contended that they

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were only liable to pay duty at the fair value rate, viz. £100 per share. The contention of the Crown on the other hand is stated in the first paragraph of the prayer of the information, viz., "That it may be declared that upon the death of the said Henry Jameson estate duty became payable under the provisions of the Finance Act, 1894, upon the principal value of the said 750 shares in the said John Jameson & Son, Limited Company, being the price which same would fetch if sold in the open market at the time of the death of the deceased testator, and that such value is not limited to the par or fair value of £100 a share, notwithstanding the special provisions as to the 'fair value,' and as to the alienation of the shares of the said Company contained in the said articles of association of the said Company, or that it may be determined in what manner such value is to be ascertained, and what is the principal value of such shares for the purposes of the said Act," and the information asks for an account of the amount due and payment by the defendants, the executors.

The Finance Act of 1894 makes estate duty leviable upon the principal value (ascertained as provided) of all property, real or personal, settled or not settled, which passes, *i.e.* changes hands, on the death of such person.

Different views have been expressed as to the effect of the 1st and 2nd sections of the Act *inter se*, but I do not think it is material for the purposes of this case to consider them.

It is clear that on the death of Henry Jameson all the interest of every kind which he had in the 750 shares became subject to the liability to estate duty. The Act, however, makes the executors liable for it directly in respect only of the property of which the testator was competent to dispose. At the time of the filing of the information the 750 shares had been registered in the names of John Jameson and George Jameson, and it seems to me therefore they are precluded from saying that all the interest of every kind which Henry Jameson had was not vested in them, and the question becomes one, I think, of valuation for the purposes of duty. That we find in section 7, sub-section 5: "The principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would

fetch if sold in the open market at the time of the death of the deceased."

The decree pronounced by the majority of the Judges of the King's Bench Division follows in its first part the words of section 7, sub-sect. 5, and then proceeds, "and that in estimating such principal value regard is to be had to the special provisions in the said articles of association dated the 9th October, 1891, with reference to alienation and transfer of the shares of the said Company and as to fair value, but that the amount of such principal value is not necessarily limited to the par or 'fair value' of £100 a share." That word "necessarily" plays an important part in the declaration, coupled with the glossary in the judgments.

There is, I think, some ambiguity in the language of that decree standing by itself, but its real meaning appears from the passage in the judgment of Mr. Justice Kenny, at p. 675 of the report, in which he sums up the result of his conclusion as leading up to the declaration. In my opinion the declaration as interpreted by his judgment stops short of what the rights of the Crown are under the 7th section, to which we must give full effect. I think the test of value, under section 7, is what the shares would fetch if sold in "open market"—an hypothetical "open market," upon the terms that the purchaser would be entitled to be registered in respect of the shares, but would himself thereafter hold them subject to the provisions of the articles of association, including those relating to the alienation and transfer of them, and this price is not limited to the "fair value." This would be much what would exist if clause 11 of the articles were applied. I am not aware that this view conflicts with the general conclusions of the Lord Chief Baron, stated at p. 682 of the report. It is not necessary for me to consider the validity of the clauses in the articles. The information does not challenge their legality, but I am not to be taken as accepting the argument of the Attorney-General as to their being invalid on the ground of repugnancy, or as offending against the law of perpetuity, or against public policy. I do not understand that last contention as regards a taxing statute, though I could the evasion of it, which, in the present case, could not arise having regard to the dates. While thinking that the decision appealed from falls

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short of the real rights of the Crown, I also think that the argument for the Crown cannot, as to the position of the purchaser buying in the hypothetical "open market," be accepted. I do not suggest that the award of costs against the Crown in the Court below should be interfered with, but I think there should be no costs of the appeal.

It is for the Commissioners, and not for us, to estimate the price under the 7th section; and they are enabled to obtain expert evidence to guide them in applying the principle which we lay down, and that estimate called "the amount of duty" can be appealed against.

HOLMES, L.J.:—

The questions involved in this appeal have been so fully considered by the Divisional Court as well as by my colleagues that I can state the grounds of my conclusion with comparative brevity.

The late Henry Jameson at the time of his death was possessed of 750 fully paid up shares, portion of the 4500 shares of £100 each which formed the capital of a joint stock Company known as John Jameson & Son, Limited, which was registered on the 9th October, 1891. This Company was one of the class sometimes described by Judges and text-writers as "private," of which the distinguishing feature is that their shares are not intended to be sold to the public in open market, but are to be retained as far as possible in the hands of the original shareholders and of members of their families. The articles of association imposing restrictions on the free disposition of the shares in John Jameson & Son, Limited, are fully set out in the report of this case in the King's Bench Division. It is enough to say, that while a share may be transferred or bequeathed to any person who is already a member, or may, subject to the approval of the directors, be transferred by a member, his executors, or administrators, to a son or brother of such member, or to the son or brother of another member, there cannot be a transfer to anyone else so long as a member is willing to purchase at what is called the "fair value," stated in the articles to be £100, or such other sum as shall from time to time be fixed by a resolution of the Company in general meeting. Means are prescribed for ascertaining whether any member is

willing to purchase at the "fair value" a share thus offered for sale; and it is only in the event of no such purchaser being found that the seller may sell to any person and at any price.

It was argued in the Divisional Court that these restrictions were void on three grounds—(1) as infringing the rule against perpetuity; (2) as being repugnant to the absolute dominion over property which its owner ought to possess; and (3) as being contrary to public policy. I am relieved from considering these propositions. The Attorney-General has admitted without reserve that the articles of which I have given an abstract are legal, and bind the Company and its members as well as any outsider who is permitted to purchase a share.

The appeal has proceeded on this basis, and, while I have no reason to doubt the correctness of this view of the law, I am not called on to express an independent opinion upon it. The Attorney-General, however, while making the foregoing admission, has argued that the articles are invalid against assignees or trustees in bankruptcy. This may or may not be so. I think that it would depend largely, if not altogether, on the history of the particular Company, and on the circumstances that led to the membership of the bankrupt shareholder. But however this may be, I do not see the analogy or relevancy of cases under bankruptcy law to the matter now to be decided. We are not dealing with a device to avoid liability under the Finance Act. The Company was registered some years before that statute passed, and the articles of association followed precedents that had been in use for a quarter of a century. The shares were from the first subject to provisions which affected their value in the hands of the shareholders; and the Legislature having imposed a tax, which is to be measured by the value of the property, we are to determine how such value is to be ascertained. The case is thus reduced to what is not only a narrow but also a simple issue, which becomes still simpler when it is freed from an element of confusion to which considerable prominence was given during the argument. By the first section of the Finance Act estate duty is to be levied and paid upon the principal value of all property settled or not settled, which passes on the death of the deceased. Now, many persons are entitled during their lives to interests in property, real and

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personal, which they have no power to dispose of, and which pass to other persons on their deaths. Estate duty is by the terms of the Act to be levied and paid upon such property, not indeed out of the assets of the deceased, but by the persons to whom the property passes. The Solicitor-General endeavoured to show that the property in the shares to which Henry Jameson was entitled was of a two-fold character—one part of which he was entitled to dispose of at his death, the other passing, as I understand the argument, to the other members of the Company.

If this is correct, there is, I think, no answer to the comment of Kenny, J., that "the information is conversant with the personal property which the deceased was competent to dispose of at his death, on which alone the defendants as his executors are compellable to pay estate duty." But there is really no ground for the contention of the Solicitor-General. Henry Jameson, during his life, by virtue of his ownership of the shares, was entitled to receive the dividends payable thereon, and to have such right of pre-emption over the other shares of the Company as is conferred by the articles of association, his own shares being at the same time subject to a similar right of pre-emption by the other members of the Company. Such right, however, did not apply to a transfer or bequest to a son or brother, and he appointed as executors his two brothers, the defendants, John Jameson and George Jameson, who are now the registered owners, and have the same interest in the shares as their testator. They, like him, are entitled to receive the dividends, and to have such right of pre-emption as he had, while no greater right of pre-emption over his shares passed on his death to the other members, than what they were entitled to in his lifetime. It is, therefore, unnecessary for me to consider what would have been the result if the executors had been strangers, as in the events that have happened the defendants are liable to pay estate duty on the principal value of the shares as they stood in Henry Jameson's name immediately before his death. If I were obliged to ascertain this value from the first section of the Act alone without reference to section 7, I would hold that it was the sum that Henry Jameson would have obtained if he could have sold and transferred the shares, in the words of clause 11 of the articles of association, to any person and

at any price, the purchaser to have the same rights therein, and to be subject to the same liabilities, as himself. I need hardly say that this sum would be different from the £100 per share at which the "fair value" is now fixed. The dividend of 20 per cent. per annum paid for years, and likely to continue, would attract men who buy securities to hold as an investment and not to resell, especially as the purchaser would always be at liberty to transfer to a son or brother. On the other hand, the price would not be as high as that of a security, equally good in other respects, that could be disposed of at any time in the open market. Turning to the 7th section of the Act, I find therein the very test of value which I should have applied in its absence. "The principal value shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased." The Attorney-General and the defendants agree in saying that in this case there cannot be an actual sale in open market. Therefore, argues the former, we must assume that there is no restriction of any kind on the disposition of the shares and estimate that would be given therefor by a purchaser, who upon registration would have complete control over them. My objection to this mode of ascertaining the value is that the property bought in the imaginary sale would be a different property from that which Henry Jameson held at the time of his death. The defendants, on the other hand, contend that the only sale possible is a sale at which the highest price would be £100 per share, and that this ought to be the estimated value. My objection is that this estimate is not based on a sale in open market as required by the Act. Being unable to accept either solution, I go back to my own, which is in strict accordance with the language of the section. I assume that there is such a sale of the shares as is contemplated by article 11, the effect of which would be to place the purchaser in the same position as that occupied by Henry Jameson. An expert would have no difficulty in estimating their value on this basis. It would be less than the Crown claims, and more than the defendants offer; but I believe that it would be arrived at in accordance not only with the language of the Act, but with the methods usually employed in valuing property.

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While I concur in much of the judgment of Kenny, J., and while, like him, I am unable wholly to accept the arguments of either side, I fear that we have not come to the same conclusion.

There is, I think, a want of precision in the language in which he has formulated his principle of valuation, and the order of the Divisional Court is vague and uncertain. I would prefer a declaration that the principal value of the shares is to be estimated at the price which, in the opinion of the Commissioners, they would fetch if sold in the open market, on the terms that the purchaser should be entitled to be registered as holder of the shares, and should take and hold them subject to the provisions of the articles of association, including the articles relating to alienation and transfer of the shares of the Company.

Solicitor for the informant: *The Solicitor for the Inland Revenue.*

Solicitors for the defendants: *Read & Macnab.*

G. Y. D.

WALSH *v.* GOODMAN (1).

K. B. Div. 1904. Dec. 14, 16.

Practice—County Court—Interpleader—Claimant—Sheriff—Civil Bill Act, 1851 (14 & 15 Vict. c. 57), s. 150.

Section 150 of the Civil Bill Act, 1851, applies to seizures by the sheriff as well as to seizures by special bailiff appointed by the execution creditor.

Where a claim is made by a third party to goods seized under a civil-bill decree, and the claimant obtains possession of the goods by lodging with the sheriff the affidavit of ownership prescribed by section 150 of the Civil Bill Act, 1851, together with the amount of the decree, he is bound to follow up the procedure prescribed by that section by causing an interpleader civil bill to be served on the execution creditor, returnable to the next Quarter Sessions; and he is barred from pursuing any remedy (*e.g.* for money had and received, or for wrongful seizure and detention) which he might have had against the sheriff independently of the Act.

Upon failure of the claimant to institute interpleader proceedings, the sheriff should, at the expiration of ten days after the next ensuing Quarter Sessions, hand over the money to the execution creditor; but *quære*, whether the claimant would have a remedy over against the execution creditor in respect of the money so paid to him by the sheriff.

CASE STATED by Madden, J., upon the hearing of a civil bill at the Kerry Summer Assizes, 1904.

The case stated was as follows:—

"1. This was a civil bill appeal, tried before me at the Kerry Summer Assizes, 1904.

"2. The plaintiff was administrator of Michael Walsh, and the defendant was under-sheriff of Kerry. The plaintiff's claim was for £40, money had and received, and for damages for wrongful seizure and detention of plaintiff's cattle.

"3. On the 17th October, 1903, Cornelius O'Connor got a decree for £32 4*s.* (including costs) against Honoria Walsh. On the 5th March, 1904, the sheriff, under said decree, seized several head of cattle, which I find as a fact to have been at the time of

(1) Before PALLES, C.B., and ANDREWS and JOHNSON, JJ.

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said seizure assets of Michael Walsh, deceased, and, therefore, the goods of the plaintiff.

"4. On the 6th day of March plaintiff handed defendant a declaration, dated the 5th March, claiming the cattle seized as his property, and the defendant refused to give up the said cattle on the said declaration.

"5. On the 7th March, 1904, plaintiff handed defendant a letter from plaintiff's solicitors, Messrs. Creagh and Byrne, stating that plaintiff would pay the defendant the amount of the decree under protest in order to release the cattle, and would sue the defendant for money had and received, and for wrongful seizure. The defendant informed the plaintiff that he would not accept the money under protest.

"6. Later on the same day the plaintiff called on the defendant with Mr. Liston, solicitor, Tralee, who stated he was instructed by plaintiff to ask why the cattle were not given up on the money being lodged under protest. Defendant replied that he would not give up the cattle on the amount of the decree being tendered under protest. Mr. Liston then said that he would get the plaintiff to make an interpleader affidavit, and lodge the amount of the decree.

"7. Subsequently, on the same day, plaintiff lodged with the defendant an interpleader affidavit of ownership (as prescribed by sect. 150 of the Civil Bill Act, 1851), which was prepared by Mr. Liston, and lodged the amount of the decree together with 3*s.* 6*d.*, the statutable fee under 27 & 28 Vict. c. 29, sch. B, part 2, with the defendant, who thereupon delivered him up the cattle.

"8. The defendant, pursuant to the 14 & 15 Vict. c. 57, transmitted to the Clerk of the Peace of the County of Kerry on the 8th March the said interpleader affidavit, and filed the same, and paid to the Clerk of the Peace the proper fee on filing.

"9. Plaintiff did not issue any civil bill against the execution creditor, but on the 31st March, 1904, issued against the defendant, the sub-sheriff, the civil bill, which came on appeal before me.

"10. The defendant when served with said civil bill had, and still has, in his hands the amount of said civil bill decree.

"11. The documents specified in the schedule were proved and given in evidence, and are to be taken as forming part of this case.

"For the defendant it was contended that on the foregoing facts he was protected by sect. 150 of 14 & 15 Vict. c. 57 from any action by the plaintiff against him for wrongful seizure, or detention, or money had and received, and that any remedy which the plaintiff may have against him in respect of said goods is barred.

"12. For the plaintiff it was contended (1) that no interpleader proceeding within that section has been instituted so as to bar the plaintiff's claim; and (2) that sect. 150 only applied to seizures by special bailiff nominated by the execution creditor, whereas the seizure here was by the sheriff's bailiff.

"13. The points involved appearing novel and of some importance, and both sides so desiring, I decided to state a case.

"14. The questions for decision are:—(1) Does sect. 150 of the Civil Bill Act, 1851, apply to seizures by the sheriff as distinct from seizures by a special bailiff appointed by the execution creditor? (2) If it does, did the lodgment of the affidavit and money, without issuing any civil bill against the execution creditor, constitute a bar to the plaintiff's claim in the civil bill, the subject of this case?

"If both of the above questions be answered in the affirmative, the dismiss of the County Court Judge is to be affirmed with costs and expenses.

"If either question be answered in the negative, the dismiss is to be reversed, and a decree for £36 8*s.* 10*d.* granted to plaintiff with costs and expenses above and below.

"D. H. MADDEN.

"25*th October*, 1904."

Matthew J. Bourke, K.C., and *Bernard Roche*, for the plaintiff:—

What has occurred here to debar plaintiff from suing the sheriff for illegal seizure of goods, which this case finds to be the property of the plaintiff? Plaintiff had a cause of action for damages against the sheriff. He deposited the value of the goods with the sheriff to the amount of the decree, and by so doing got up the goods under sect. 150. What is there in the section that thereupon extinguished his right of action for damages against the

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sheriff? In return for the goods he deposited the money. Neither the sheriff nor the execution creditor was in any way prejudiced in his position by that. The only effect of it was to secure the amount of the decree in money in the hands of the sheriff, and to procure immediate possession of his goods for the claimant. The right of having the question of property in the goods adjudicated upon in a civil-bill process under the section was a right conferred on the claimant. The scope and tenor of the section show that such right was given as one which, at his option, he could exercise or not as he was minded. For the paramount object of the section was in ease of such claimants by affording them a cheap and expeditious mode of having their claims adjudicated on. There is no indication in the section that the relief or protection of sheriffs was its object. An adjudication on a civil bill issued under the section at the option of the claimant was the paramount object. As subsidiary to that, it provided for the deposit of the amount of the decree with the sheriff, and the delivery up of the goods to the claimant. In all this there is nothing to suggest an extinguishment of the original right of action for damages against the sheriff. The damage might have been double the amount of the decree. Can it be argued that if the claimant in the civil-bill process only raised the question of property, and the Judge confined his decision to that point, the claimant would be barred from suing the sheriff for the damage, extra the amount of the decree? The exact opposite was decided in *Mercer* v. *Stanbary* (1), and was so decided on the ground that there had been no adjudication in fact on such question of damages. Furthermore, in *Challiner* v. *Burgess* (2), where the claimant made default in proceeding with the civil bill, and there was accordingly no adjudication, the Court held that the claimant was not estopped from afterwards maintaining his ordinary Common Law action of trespass. Yet the English Act (9 & 10 Vict. c. 95, s. 118) under which these cases were decided was one in relief and protection of the sheriff, and gave the Court the widest jurisdiction to make such order, or do as it thought fit. In face of these decisions and of the fact that there has been neither adjudication made

(1) 25 L. J. Ex. 316. (2) 3 Saunders & Macrae's Co. C. Cas. 147.

nor civil bill issued in the present case, what is there to bar the right of action against the sheriff for illegal seizure? Even if under the wording of the section he is bound to hand over the money to the execution creditor as a ministerial act, that circumstance cannot affect his own Common Law liability for the trespass. Our contention, however, is that there is no warrant for the sheriff's paying over the money, because the section says that the person he is to pay it to is the defendant in the interpleader civil bill, and here there is no such civil bill, and, therefore, no such defendant. The issuing of such a civil bill, setting forth the claimant's claim, and an adjudication thereupon, are contemplated throughout the section as the essential conditions of an alteration of the rights or status of the parties. Furthermore, the section only applies to seizures by special bailiffs.

P. D. Fleming, K.C., and *M'Elligot*, for the defendant:—

This question must be decided on the meaning of the 150th section of the Civil Bill Act. That section provides for the cases of execution by the sheriff and execution by special bailiff. It is mandatory on a person claiming goods seized and lodging money with the sheriff to bring a civil-bill process against the execution creditor to have the question of property decided. The hands of the sheriff are tied until after the ensuing Quarter Sessions, and then either upon the production of a dismiss in favour of the execution creditor or upon non-production of a decree in favour of the claimant, he is bound to pay over the money to the execution creditor. The non-production of a decree in favour of the claimant contemplates the case of a claimant not proceeding in the manner pointed out by the section. In that event also the sheriff is bound to pay over the money to the execution creditor. The sheriff was only an official depository to hold the stake until the rights of the parties interested are ascertained in due process of law: *M'Morrin* v. *Dixon* (1). The proviso at the end of the section also shows that once the claimant has adopted the procedure under this section he cannot proceed at Common Law against the sheriff.

(1) 31 Ir. L. T. R. 3.

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The claimant by making the affidavit of property and lodging the money with the sheriff led the sheriff to believe that he would proceed by interpleader civil bill, and it is not open to the claimant afterwards to abandon those proceedings and proceed against the sheriff for money had and received at the very Sessions for which he ought to have brought the interpleader civil bill. It is clear on the construction of the section that until after the then ensuing Quarter Sessions the sheriff could not part with the money to either the claimant or the execution creditor. This proceeding is therefore wholly misconceived. The preamble of the section shows that it was intended to provide a cheap and expeditious mode of adjudicating upon such claims, which was in aid of claimants, and the general scope of the section indicates that once a claimant adopts that mode, the sheriff is out of it, and is merely a stakeholder until there is a judicial determination as to the party to whom the moneys deposited with him belong.

Dec. 16.

PALLES, C.B.:—

Of the two questions put to us by Mr. Justice Madden, the first admits of an easy answer: Does section 150 of the Civil Bill Act of 1851 apply to seizures by the sheriff, as distinguished from seizures by a special bailiff appointed by the execution creditor? I am of opinion that it does. It occurs in a group of sections, commencing with section 145, each of which relates to the execution of decrees, and each of these sections, 145 to 149 inclusive, plainly relates to all decrees, whether the seizures themselves are effected by the sheriff or by a special bailiff.

The mischief to be remedied is shown by the preamble to be wide enough to include both classes of seizures: "Whereas difficulties may arise in the execution of *any* decree or order made under this Act by reason of claims," &c. So, too, is the remedy intended to be provided: "And it is reasonable to afford a cheap and expeditious mode of adjudicating upon *such* claims." So also are the enacting words of the section: "Where *any* goods taken under *any* decree shall be claimed by any person who is not a party to such decree, it shall be lawful for the said person," &c.; and these general words are carried on by apt words of reference

throughout the section; so that unquestionably there is not in the words of the enactment itself any such restriction as is suggested. Again, the paramount intention of the section is to relieve claimants, not parties against whom the decree issued, by affording them a quick and summary remedy against the execution creditor. It is only at the election of the claimants that the proceeding contemplated by the section can be initiated, and in the absence of such initiation all the previously existing remedies of the claimants are preserved. It would be, *prima facie*, unreasonable to hold that claimants could be barred of this intended relief by the plaintiff against whom the remedy is given electing to execute his decree in one of the two modes provided for him by section 145.

Lastly, when the Act, 27 & 28 Vict. c. 99 (which *quoad hoc* remained in force only until the coming into operation of the 34 & 35 Vict. c. 99, s. 5), extinguished the power of execution by special bailiffs, this section 150, which in that event would have ceased to have any application, is not one of the sections repealed thereby. In answer to all these considerations, the only answer I have heard is that it would be unreasonable to give it the construction contended for, as under the words of the section the execution creditor might be made liable in damages and costs for a seizure which he had neither authorized nor adopted. It is true that the section does not (as does our Interpleader Act, 9 & 10 Vict. c. 64, in relation to seizures under writs of the High Court) give the execution creditor the opportunity of abandoning his claim before involving himself in a contest as to property. He does, therefore, in my opinion, become liable, if the claimant succeeds, for costs, and possibly, to the limited sum, for damages, although he did not authorize the seizure. This liability is, no doubt, somewhat arbitrary; but it is inherent in the prescribed "cheap and expeditious mode of adjudicating on" the claim, as had an additional step of procedure (similar to the summoning order of the High Court) been prescribed, the ultimate adjudication might be delayed for an additional session, and probably the Legislature thought that the selection by the plaintiff of the sheriff to execute should not put the defendant in a worse position than he would have been in had the other mode been selected. Furthermore, it must be remembered that we cannot

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derive much assistance by comparing the rights of an execution creditor under a decree with the Common Law rights of an execution creditor under a writ of the High Court, as the former has the anomalous right, unknown to the common law, of taking the law into his own hands by executing the writ through his own special bailiff, for whose acts the sheriff is not responsible. The Common Law rights of a claimant who resorts to this procedure are affected much more than are those of the execution creditor, for, as I read the sections, a claimant by adopting this procedure loses his right to damages wholly against the sheriff and against the execution creditor, save to the extent of £5. I regard the section as providing an optional remedy—somewhat rough and ready—not exactly commensurate with that given by the Common Law, but having some compensating advantages, as, for instance, that given to the claimant of obtaining possession of his goods without awaiting the result of the litigation; those of the execution creditor of becoming entitled to the money deposited in the absence of an adjudication at the earliest period, and of the limitation of damages to £5; and that of the sheriff of being relieved from liability by its initiation. Further, the Act can be construed as not inflicting any substantial injustice upon the execution creditor, because the liability of the execution creditor, by reason of a seizure by the sheriff of goods not pointed out to him by that creditor, would impose a duty on the sheriff to the execution creditor to use due care not to seize goods not pointed out, unless he could show they were those of the execution debtor.

The second question is more difficult, but I cannot say that, after consideration, I entertain much doubt about it. The view I take of the procedure established by the section is shortly this. To bring it into operation money must be lodged with the sheriff. Consequently the legislation would be imperfect if it did not provide for the disposal in any event of the money so lodged. The mode in which it is to be disposed of depends upon the existence and nature of an adjudication upon the interpleader process. Therefore the direction—"and the person so claiming the said goods and depositing the said money with the sheriff as aforesaid *shall* cause a civil-bill process to be served on the plaintiff"—is mandatory, and not, as argued by Mr. Bourke, directory

merely. The entire operation of the section depends upon this service. Therefore the claimant, by invoking this jurisdiction, obtains the benefit of his goods being delivered to him, and he does so by subjecting himself to an obligation, which, if he fulfils, must result in the sheriff being freed from liability. He cannot accept the benefit, and reject the burden. He cannot obtain his goods and at the same time, by neglecting his statutory obligation, deprive the sheriff of the benefit, the conferring of which was part of the price which the statute required him to pay for the benefit he acquired. Had he performed his obligation, the execution creditor would have been the person described in the section as the defendant in such last-mentioned civil bill, and, to my mind, he cannot, by his non-performance, deprive that person of his statutable right.

In my opinion, the sheriff ought, in the events which happened, to have handed over the money to the execution creditor on the expiration of ten days after the April Sessions. He has not done so, and it is, therefore, money of the execution creditor in his hands, and he is liable to him for it. However, as regards the claimant—the present plaintiff—the proviso at the end of the section appears to me to apply, that if the claimant does institute "a proceeding under this provision," he is barred from any remedy he would have had against the sheriff before the Act; and I think that he did institute the proceeding by lodging the money and making the affidavit. Consequently, the second question should be answered in the affirmative.

I say nothing as to the effect of the proceeding upon the liability of the execution creditor. It appears to me capable of argument that, as he must be one of the parties to the interpleader suit, his rights would depend upon the adjudication, and that where, as here, there has not been an adjudication, he might remain liable for the seizure, if unlawful. On this, however, I say nothing, as it is not before us, and possibly it may be raised hereafter. Here we have to deal with the sheriff only, and he, I hold, is discharged.

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WALSH v. GOODMAN.

ANDREWS, J. :—

I agree with the Lord Chief Baron in the answers which should be given to the questions submitted, and I also agree in his construction of the 150th section of the Civil Bill Act of 1851. It does not appear to me that it necessarily follows from this construction that an innocent execution creditor can ever be made responsible in damages for the wrongful act of the sheriff, and even if the sheriff should hand over the money to the execution creditor, it does not appear to me that the claimant would be without a remedy, assuming that the goods belong to the claimant, and I am not to be taken as implying that the claimant could not follow the money in the hands of the execution creditor, and have a remedy over against the execution creditor accordingly.

JOHNSON, J. :—

I agree in the conclusions of the Court as to the way in which the two questions should be answered. The case finds that the cattle were the property of the claimant. The claimant had two courses—he could either proceed by interpleader civil bill, or he could have recourse to his Common Law remedy. I think that by electing to proceed by civil-bill interpleader he is bound by his election, and that his Common Law remedy is gone. The original Civil Bill Act of 1851 consolidated the law for the administration of justice in what is popularly known as the "Poor Man's Court," and section 150 provides a cheap and expeditious mode of adjudication on claims for goods taken in execution under a civil-bill decree. Before the repeal of the 145th, 146th, and 147th sections of the Act, section 150 in its terms was applicable to executions to be levied either by special bailiffs or by the sheriff. I think that is put beyond doubt, because when the 27 & 28 Viet. c. 99, sect. 60, repealed the power of execution by special bailiffs, it left the interpleader section 150 of the Act of 1851 untouched, and, therefore, that interpleader section could then have had no operation unless it applied to executions by the sheriff.

The claimant, by electing to proceed under the civil-bill interpleader jurisdiction, in my opinion, fixed himself by his election. He made the affidavit, he lodged the money with the sheriff, and

thus got the immediate return of his cattle. He was not at liberty then to stop short. He did, in fact, stop short, but the execution creditor had not withdrawn, and the jurisdiction which the claimant had invoked required him to proceed in the manner prescribed by section 150, to have his claim adjudicated on by the County Court Judge, and he ought to have gone on and served his interpleader civil bill on the execution creditor, and proceeded accordingly. The sheriff holds the money, and is liable for it. He cannot part with it except on a legal acquittance, pursuant to the provisions of section 150, unless the execution creditor authorises him to pay the money over to the claimant, who is found by the learned Judge to be the owner of the cattle, now represented by the money. If the execution creditor does not do that, I quite agree that the sheriff has no alternative but to hand the money over to the execution creditor, and let the claimant follow it in his hands.

Solicitors for the plaintiff: *Creagh & Byrne.*
Solicitors for the defendant: *F. & C. Downing.*

J. L.

CLOKEY *v.* LONDON AND NORTH-WESTERN RAILWAY CO. (1).

(1904. No. 13,093.)

Practice—Railway Company—Principal office in England—Railways Clauses Consolidation Act, 1845, *s.* 135—*Special mode of service—Substitution of service not allowable—Writ of summons containing a false address within the jurisdiction—Setting aside writ—Order IX., Rr.* 5, 11—*Order XI., R.* 1 (*e*).

Where there is a statutory provision regulating service of process upon a defendant, by which such process ought to be served out of the jurisdiction, service of a writ of summons cannot be effected under Order IX., Rule 2, on an agent within the jurisdiction; and service of the writ in an action not within Order XI., Rule 1, cannot be substituted under Order IX., Rule 5, on such an agent.

(1) Before PALLES, C.B., and JOHNSON and GIBSON, JJ.

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The principal office of a Railway Company, within sect. 135 of the Railways Clauses Consolidation Act, 1845, is the head office where the government of the railway is carried on.

Where the true address of a defendant, known to the plaintiff, is out of the jurisdiction, the deliberate insertion in the writ of a false address within the jurisdiction is a violation of the Rules in that behalf, and such a writ will be set aside.

Lewis v. *Herbert* (16 L. R. Ir. 340) observed upon.

MOTION to set aside the writ of summons, and to discharge an order of Boyd, J., dated the 4th November, 1904, whereby it was ordered that service of the writ and of the order to be made personally on H. G. Burgess, the manager of the defendants in this country, be good and sufficient service of the writ on the defendants. The writ was endorsed with a claim for damages for breach of duty in and about the carriage of a quantity of margarine and loss sustained through damage thereto by the defendants when carrying same; and the defendants' address, endorsed thereon, was North Wall, Dublin. The order was obtained on an affidavit which stated that the plaintiff was engaged in wholesale margarine business in Dublin, and had a number of packages of margarine consigned to him in Dublin. When the margarine was delivered to him, it was found that a considerable amount of it had been damaged in transit, and when delivered by the defendant Company their attention was drawn to the fact that not alone had delay occurred but that the goods were damaged. The plaintiff claimed compensation, and was then instructed by the defendant Company to realise, on their behalf, the stuff which had been damaged at the best possible price, which accordingly he did; and although he had frequently applied to them both personally and through his solicitor for payment of the amount of the damages, arising from the sale of the margarine in a damaged condition, he had received no payment from the defendant Company. A letter was written to the manager of the defendant Company asking him to name a solicitor who would accept service of a writ of summons on behalf of the Company, to which no reply had been received. It was alleged that the London and North-Western Railway Co. was an English Company carrying on business at North Wall Station, Dublin, where they had a manager, H. G. Burgess, and

that service on him would be at once communicated to the Company's London office.

The grounds upon which the proceedings were impugned were that the cause of action was not comprised within the provisions of Order XI., Rule 1; that the defendants were not domiciled or ordinarily resident within the jurisdiction of the Court; that the writ was irregular in stating the address of the defendants to be at the North Wall, Dublin; that leave to issue the writ should first have been obtained; that the affidavit upon which the motion for liberty to substitute service on H. G. Burgess was grounded did not state the particulars required by Order XI., Rule 2; that facts material to be known to the Court when granting the order for substituted service were omitted from the affidavit; that it was reasonably possible to effect personal service on the defendants, if the action was one which could have been brought in Ireland; and that, having regard to the amount of the claim and the comparative cost and convenience of proceedings in Ireland, or in the place of the defendants' residence, and to the powers and jurisdiction of the County Courts in England, where the defendants resided, the order should not have been granted.

The affidavit of H. G. Burgess stated that the defendants were an English Company having their principal office at Euston station, in the county of Middlesex, England, and that he held no authority from the Company to accept service of writs of summons or other legal process on their behalf. The margarine, for alleged damage to which this action was brought, was shipped by D. Hartogs, Rotterdam, in two consignments, carriage paid, by the Hull and Netherlands Steamship Company, Limited. One consignment was to P. L. Smith, Dublin, and the other to Hall Brothers, Dublin; and both were delivered at Hull, in Yorkshire, to the North-Eastern Railway Company, by whom they were transferred to the defendants at their station at London Road, Manchester, for carriage to Dublin, to the above-named consignees. Save this, there was no contract between the plaintiff and the defendants. The total amount claimed by the plaintiff was £19 6s., and the County Courts in England, where the defendants resided, had jurisdiction in respect of claims up to £50; and the costs of proceedings in

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those Courts would, he believed, be much less than those of an action in this Court.

In reply, the plaintiff averred that the defendants were the owners of a large station and hotel at the North Wall, Dublin. They also owned steam-boats plying between Holyhead and Dublin, and had a considerable railway interest in Ireland; and he believed that their trade in Ireland formed a very considerable portion of their general business, and was most important and valuable. He believed that the whole, or a large part, of the Irish business of the Company was transacted at North Wall; and all the correspondence connected with his claim was carried on with the principal office in Dublin; and no letters were written from London, or any reference made thereto. The defendants' offices at North Wall had their name placed upon them in conspicuous characters, and their letters were headed "London and North-Western Railway Traffic Manager's Office, North Wall Station, Dublin.

Gerald FitzGibbon, for the defendants, in support of the motion:—

There cannot be substituted service when there is no legal power to serve the writ personally on the defendants: *Fry* v. *Moore* (1); and *Welding* v. *Bean* (2). A defendant out of the jurisdiction cannot be personally served, except in cases comprised in Order XI., Rule 1, which is exhaustive: *Re Eager* (3); *Re Busfield* (4); *O'Connor* v. *Star Co.* (5); *Attorney-General* v. *Drapers' Co.* (6); *Re Cliff* (7). This action does not fall within any of the sub-sections of Order XI., Rule 1. The writ must be set aside, as a false address of defendants was given to procure the issuing of it by bringing the case within Order XI., Rule 1 (*e*): *The W. A. Sholten* (8).

As to the question of whether the writ should have been issued without leave, the Court is of course bound by *Lewis* v. *Herbert* (9);

(1) 23 Q. B. D. 395.
(2) [1891] 1 Q. B. 100.
(3) 22 Ch. D. 86.
(4) 32 Ch. D. 123.
(5) 30 L. R. Ir. 1.
(6) [1894] 1 I. R. 185.
(7) [1895] 2 Ch. D. 21.
(8) 13 P. D. 8.
(9) 16 L. R. Ir. 340.

but that was an obviously wrong decision. The affidavit on which the motion for leave to substitute service was grounded did not contain, as required by Order XI., Rule 4, the evidence required by Order XI., Rule 2. The plaintiff cannot contend that the service might have been effected under Order IX., Rule 11, as the Railways Clauses Act, 1845, is incorporated with the Local and Personal Act of the same year, by which the defendant Company was formed, and that prescribes the Company's principal office as the place for service. The principal office of the defendants is at Euston, Middlesex, and service elsewhere is bad: *Garton* v. *Great Western Railway Co.* (1); *Palmer* v. *Caledonian Railway Co.* (2).

H. Morgan Byrne, for the plaintiff:—

The first part of Order IX., Rule 11, deals with service of writs on corporations in the absence of statutory provisions; and the second part with the service of writs where there are such statutory provisions:—In the latter case the manner of service is to be the "manner so provided" by the statutory provisions. The Railways Clauses Act, 1845, incorporated by the Local and Personal Act, prescribes that in the case of the London and North-Western Railway Company, at the principal office or one of the principal offices of the Company. Then Rule 5 of the same order provides that, "If it be made to appear to the Court or a Judge that the plaintiff is from any cause unable to effect prompt personal service or such other service as is prescribed by these rules, the Court or Judge may make such order for substituted or other service, or for the substitution for service of notice, by advertisement or otherwise, as may be just." The rules having prescribed that the Company was to be served at their principal office, or one of their principal offices, or their secretary. Being unable to serve the secretary at one of the principal offices, viz. the North Wall, we applied under Order IX., Rule 5, and got an order directing substituted service on the manager at the North Wall. Rule 5 was plainly intended to allow substituted service in a case of this kind. The North Wall is undoubtedly one of the principal offices of the Company, which is a foreign corporation carrying on business

(1) E. B. & E. 827. (2) [1892] 1 Q. B. 823.

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in such a way as to be resident in this country, and therefore capable of being served with a writ on its officer in Ireland. [He referred to *Logan* v. *the Bank of Scotland* (1); and *La Bourgogne* (2); *La Compagnie Générale Transatlantique* v. *Law* (3).]

[The following cases were also referred to:—*Jones* v. *Scottish Accident Insurance Co.* (4); *Watkins* v. *Scottish Imperial Insurance Co.* (5); *Lenders* v. *Anderson* (6); and *Rowan* v. *Sharpe* (7).]

PALLES, C.B.:—

We do not require to hear Mr. FitzGibbon in reply. We think that both the order and the writ ought to be set aside. Order IX., Rule 11, provides that, "Where by any statute provision is made for the service of any writ of summons . . . upon any corporation, . . . every writ of summons may be served in the manner so provided." Now provision is made by the 135th section of the Act of 1845 (8 & 9 Vict. c. 16) for service of a writ on this corporation: "It may be served by the same being left, or transmitted through the post, directed to the *principal* office of the Company, or one of their principal offices where there shall be more than one, or being given personally to the secretary, or in case there be no secretary, then by being given to any one director of the Company." I cannot entertain a doubt that Euston is the principal office of this Company. If authority were required for that, it will be found in *Garton* v. *The Great Western Railway Company* (8). The gentleman who represents the Company at the North Wall is not a person who could be served within the meaning of that section. Therefore, I hold that this writ has not been served in the manner prescribed by Order IX., Rule 11.

Then Mr. Byrne relies on Rule 5 of the same Order, under which, he says, the order can be supported. It provides—"If it be made to appear to the Court or a Judge that the plaintiff is from any cause unable to effect prompt personal service, or such

(1) [1904] 2 K. B. 495.
(2) [1899] P. 1.
(3) [1899] A. C. 431.
(4) 17 Q. B. D. 421.
(5) 23 Q. B. D. 285.
(6) 12 Q. B. D. 50, at p. 55.
(7) 1 New Ir. Jur. R. 82.
(8) E. B. & E. 837.

other service as is prescribed by these rules, the Court or Judge may make such order for substituted or other service, or for the substitution for service of notice, by advertisement or otherwise, as may be just." But here it is not shown that there is any difficulty in effecting the service authorized by the rule. The difficulty is that such a service in the present case will not subject the defendants to the obligation of appearing in this country. The rule was not intended to authorize service within the jurisdiction in a case in which the proper service should have been made out of the jurisdiction, and in which the Court had not power to give liberty to effect such service. As to *Compagnie Générale Transatlantique* v. *Law* (1), and cases of that type, cited by Mr. Byrne, the defendants were foreign corporations resident in England; and as to them, there was, in the language of the English rule (Order IX., Rule 8), "an absence of statutory provision regulating the service of process," and consequently the service was, under the rule, to be on "the head officer."

The remaining question is as to the writ. In England the rule is, that if the defendant's address, as given in the writ, is a foreign one, the clerk in the Record and Writ Office will not seal the writ unless an order giving liberty to issue it is produced. That exact practice cannot prevail in this country, in consequence of the decision in *Lewis* v. *Herbert* (2)—a decision by which, although I dislike it as much as I did when it was pronounced—I am bound, and which I shall certainly follow. The question there decided may be reconsidered in the Court of Appeal, if it thinks fit; and, for my own part, I should be glad that the case was reconsidered. It was a decision of two Judges, condemning the considered practice of the Exchequer, which was in conformity with the English practice, and was made on an *ex parte* application, in which there was no opportunity of counsel being heard in support of the Exchequer and English view. The existence of this case as an authority is the basis of one of the few divergencies in practice between this country and England: divergencies which are lamentable, and are contrary to the spirit and policy of our Judicature Act. However, I pass from that.

(1) [1899] A. C. 431. (2) 26 L. R. Ir. 340.

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The reason I am of opinion that the writ should be set aside is because the provision of our rules as to the defendants' address was deliberately violated. An address known to be false was inserted in the writ for the purpose of obtaining that to which the plaintiff was not entitled—a trial in this country.

In my opinion, the High Court in Ireland has no jurisdiction over the subject-matter of the suit. The writ issued improvidently, and ought to be set aside.

JOHNSON and GIBSON, JJ., concurred.

Solicitor for plaintiff: *L. J. Dennehy.*
Solicitors for defendants: *Sutton & Son.*

J. L.

K. B. Div. 1904. Jan. 12, 18.

SLATER, APPELLANT; BREWSTERS, LTD., RESPONDENTS(1).

Bread—Sale of, otherwise than by weight—Cutting dough by machine before baking—1 & 2 Vict. c. 28, s. 4.

By 1 & 2 Vict. c. 28, section 4, all bread (with certain exceptions) sold in Ireland must be sold by weight only, and not by measure, and bakers selling bread otherwise than by weight are rendered liable to a penalty:—

Held, that, to satisfy the requirements of the section, the bread must be actually weighed *as bread* before or at the time of sale; and it is not sufficient to show that the dough was cut by a machine into pieces calculated, when baked, to weigh a certain number of pounds.

CASE STATED by the Justices of the county of the city of Londonderry under 20 & 21 Vict. c. 43.

At a Petty Sessions, held on the 7th December, 1903, for the county of the city of Londonderry, the respondents were charged on summons for that they, being sellers of bread, on the 26th November, 1903, refused to sell bread by weight to the appellant (the complainant in the summons), and sold, or caused to be sold, bread in manner other than by weight (2). At the hearing of the

(1) Before LORD O'BRIEN, L.C.J., and MADDEN and WRIGHT, JJ.

(2) The prosecution was under sect. 4 of 1 & 2 Vict. c. 28. See the section in the judgment of Lord O'Brien, L.C.J., *post*, p. 262.

complaint, evidence was given on behalf of the complainant that, on the day in question, she went into the defendant's shop and asked for a 3*d.* loaf. An assistant papered up a loaf and handed it to her. She paid 3*d.* for it, and left the shop. The loaf was not weighed then, but was weighed subsequently by the complainant's master, and found to weigh 1 lb. 15 oz. There was no stamp on it. On behalf of the defendants evidence was given by their managing director that he had introduced a machine which turned out the dough cut into sizes which, when ovened, were 2 lb. and 4 lb. respectively. That he had also a man sealing or stamping the dough all the time. That all the loaves were stamped, though some might be more deeply stamped than others. That he only baked in two standard loaves in household bread, 2 lb. and 4 lb. That the bread was full weight. That if a person came in and asked for a 3*d.* loaf, he would get a 2 lb. loaf, or two of that weight for 5½*d.* That farthings were not current in Derry. That no weight is mentioned unless asked. That he always weighed the bread when asked. An assistant of defendants stated that she told complainant's employer that all their bread was guaranteed full weight. A handbill was put in evidence, dated the 2nd November, 1903, and signed by, among the others, the respondents, which had been extensively circulated, and had appeared as an advertisement in the local newspapers, stating that the bakers who signed it undertook to supply the public with 4 lb. and 2 lb. household bread, full weight, according to law, as no household bread could be sold by price, but all by weight; that they had agreed to sell the household loaf at the weights given above—viz. 4 lb. and 2 lb. only—and asked the consumers to see they got these weights, as there should be no such thing as a loaf sold by price; that the present price was 5½*d.* for a full-weight loaf; and that from the date of the handbill, the household loaves of the bakers who had signed it would have the weight stamped on each, which the public should insist on seeing.

The Justices stated that they were of opinion—1st, that the bread was sold by weight; 2ndly, that only two weights of loaves, 2 lb. and 4 lb. respectively, were baked; 3rdly, that the price was regulated by weight; and 4thly, that the defendants not only

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advertised that they were selling by weight, but warned the public against buying bread otherwise than by weight. They gave judgment against the complainant, and dismissed the summons on the merits, but on the requisition of the complainant stated the present case; the question for the judgment of the Court being whether the Justices were correct in point of law in their determination, or as to what should be done in the premises.

Leech, for the appellant:—

In order to comply with the provisions of section 4 of 1 & 2 Vict. c. 28, there must be a weighing, before or at the time of the sale, of the loaf *as bread*. It is not sufficient to weigh the dough before it is put in the oven: *Jones* v. *Huxtable* (1); *The Queen* v. *Kennett* (2); *Hill* v. *Browning* (3). The exception as to "fancy bread" in the proviso at the end of the section bears out this construction.

Henry, K.C. (with him *Horner*), for the respondents:—

In all the cases cited the defendant was convicted by the magistrates, but here the magistrates, who are the judges of fact, found that the bread was sold by weight, and dismissed the summons. There is evidence to sustain that finding, since what took place here amounted in substance to a selling by weight. Actual weighing is not necessary. In *Jones* v. *Huxtable* (1) Blackburn, J., points out that the offence is selling otherwise than by weight; and he states that if in that case there had been a sale in terms of a 4 lb. loaf, and if by mistake, or even if intentionally, it had turned out deficient in weight, the seller would have incurred no penalty, the statute not making this an offence. Section 4 of 1 & 2 Vict. c. 28, provides that bread is to be sold by weight *and not by measure*. The insertion of the words "and not by measure," which do not occur in the corresponding English section, 6 & 7 Wm. 4, c. 37, s. 4, shows that, in the Irish Act at all events, what the Legislature contemplated was the mode of sale, and not the necessity for actual weighing. If I agree to buy oats at so much a stone, and the seller gives me a

(1) L. R. 2 Q. B. 460. (2) L. R. 4 Q. B. 565. (3) L. R. 5 Q. B. 453.

bag which he says contains 14 stone, which I accept, surely that is a sale by weight, although the oats are not in fact weighed. The proviso at the end of section 4 is an exception not merely out of that section, but out of the whole Act; it can be given an intelligent meaning by referring it to section 6. The 4th section gives no real protection to the purchaser, since there is no penalty if the baker weighs the loaf and sells it as a 2 lb. or 4 lb. loaf, knowing it to be under that weight. The true protection given by the statute is to be found in section 6, which entitles the purchaser to have the bread weighed in his presence if he so requires. In large bakeries it would be practically impossible to carry on the business if each individual loaf had to be weighed before or at the time of sale.

Leech, in reply.

Cur. adv. vult.

LORD O'BRIEN, L.C.J.:—

Jan. 18.

The broad question in this case is whether, under the 1 & 2 Vict. c. 28, s. 4, the seller of bread becomes amenable to the penalties therein mentioned if he sells bread on the basis merely that it is of a certain weight, without having actually weighed the bread either before or at the time of sale.

A 3*d.* loaf was sold at the defendants' establishment, and it was, I am willing to assume, as contended for by the defendant, sold on the basis that it was a 2 lb. loaf. It was, in fact, not 2 lb. in weight. When subsequently to the sale it was actually weighed, it was found to be something less than 2 lb. It appears from the case before us that the seller used a certain machine for cutting up the dough into pieces which, when "ovened," to use an expression of the witness for the defendant, were supposed to consist of loaves of a certain number of pounds weight. The particular loaf sold in the present instance was supposed to contain 2 lb., and was sold on that basis. It is plain there was no actual weighing of the loaves as bread either before or at the time of selling. The weight of the loaf when baked is quite an uncertain matter, depending on the amount of evaporation in the process of baking, on the degree of heat in the oven, on the quality of the flour, and, I believe, even on the state of the

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atmosphere. In the present case the weight of the bread was not ascertained by actual weighing. Should it be ascertained by being weighed is the question we have to determine. Our answer to that question is in the affirmative. There must be an ascertainment of the weight by the person who sells by actual weighing, either before or at the time of sale.

What, then, is the language of the section upon which the controversy arises? It is as follows:—"And be it enacted, That from and after the commencement of this Act all bread sold in Ireland shall be sold by the several bakers or sellers of bread respectively by weight only and not by measure; and in case any baker or seller of bread in Ireland shall sell or cause to be sold bread in any other manner than by weight, then and in every such case every such baker or seller of bread shall for every such offence forfeit and pay any sum not exceeding forty shillings, which the magistrate or magistrates, justice or justices before whom such offender or offenders shall be convicted shall order and direct: Provided always, that nothing in this Act contained shall extend or be construed to extend to prevent or hinder any such baker or seller of bread from selling bread usually sold under the denomination of French or fancy bread or rolls without previously weighing the same."

This is the section in question. It consists, as will be perceived, of an enacting part and of a proviso. Any ambiguity which might exist in the enacting part is clearly removed by the proviso, for it provides that in the case of certain specified articles actual weighing is not necessary, plainly indicating that weighing in the earlier part of the section means weighing so as to ascertain the weight by actual weighing, and that a sale on the basis merely that the bread sold is of a certain weight is not sufficient. There must be an ascertainment of the weight by actual weighing. The enacting part of the section must be read by the light of the proviso. This proviso is in the very section which creates the offence; and as it uses the words "actually weighing," it removes, in my opinion, the question from the region of doubt.

It is also to be remembered that the statute does not impose a penalty for the weight being deficient, which shows that the substantive offence created is selling without actually weighing. In

the present instance the loaf sold was short of the weight it was alleged to contain, and if the respondents' contention was correct, he could not be proceeded against under the statute. He could sell on the basis of bread being of a certain weight without subjecting himself to a penalty if the bread sold was deficient in weight. The enactment in the statute that the seller should have scales and weights was made plainly for the purpose of enabling the buyer then and there to test the weight, but does not control the 4th section as to the obligation of the seller to weigh before or at the time of sale.

I think it is sufficiently clear from the statute itself what was meant. We are not, however, unassisted by authority. The scope and object of the statute is, perhaps, best explained by Lush, J., in the case of *The Queen* v. *Wood* (1). The precise point decided in that case was whether the particular bread sold was such bread as was contemplated by the proviso to section 4 of 6 & 7 Wm. 4, c. 37 (which is identical with the Act upon which the present prosecution is founded), but in giving judgment Lush, J., explains the scope and object of the statute. He is reported, at page 562 of the report, to have said :—"The object of the Legislature in passing the Act was to liberate the trade from the restrictions of the Assize Act, and leave the baker at liberty to make bread of any size and shape he pleased, and to charge his own price for it; but in order to protect the customer from imposition, it required the baker to sell by weight. He is no longer at liberty to sell at so much per loaf, he must sell at so much per pound; and the customer is to be supplied with so many pounds of bread, unless he chooses to have an article of exceptional quality, something that is not ordinary bread; and if he buys that, the baker is to be at liberty to sell it without reference to its weight."

In that case the distinction between selling on the basis of an article containing so many pounds weight, and of the weight being ascertained by actual weighing, was not gone into; but this distinction was gone into in an immediately subsequent case in the same volume of the reports, namely, the case of *The Queen* v.

(1) L. R. 4 Q. B. 559.

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SLATER, *Appellant*; BREWSTERS, *Respondents*.

Palles O'Brien, L.C.J.

Kennett (1). In that case the Chief Justice Cockburn said—he was dealing with two cases—"The facts were that in both cases the person applying to purchase bread asked for bread by weight; in one case for a 4 lb. loaf, and in the other case for a 2 lb. loaf. The loaves were delivered as such, and taken away and afterwards weighed. In each instance it turned out that the loaf was substantially deficient in weight. We think when a customer asks for bread by weight, that clearly is a case in which, whether the baker chooses to give him ordinary bread or fancy bread, the baker is bound to sell by weight. Under the circumstances of the case we by no means say that the baker was bound to weigh in the presence of the customer; but he was bound to weigh the bread at some time or other before he sold it, and to sell it by weight instead of by the denomination of household bread, fancy bread, or any other denomination."

Now, it was argued that there was no request for bread by weight in the present instance. However, I think that argument could not successfully be maintained. There was a request for a 3*d.* loaf, and this was understood to mean a 2 lb. loaf. Indeed this is apparent from the circular of the defendants which was given in evidence, and counsel for the defendants actually so contended. A 3*d.* loaf and a 2 lb. loaf were convertible terms, and a request for the one involved a request for the other. It will be perceived that Cockburn, C.J., used the word "clearly." He did not lay down absolutely that a demand for sale by weight was necessary. What he said as to a demand for sale by weight was intended by him to apply to fancy bread, and not to ordinary bread. The word "demand" or "request" for sale by weight does not appear in the statute.

The case of *The Queen* v. *Kennett* (1) would appear to be an authority in favour of the prosecution. However, there is the later case of *Hill* v. *Browning* (2), which appears to me to be very like the present case, and to govern it. There the practice of Hill, the appellant, who was convicted, was to sell loaves of bread at 6*d.*, varying the weight of the loaf with the price of corn. When he purposed to sell a 3½ lb. loaf for 6*d.*, the custom in

(1) L. R. 4 Q. B. 565. (2) L. R. 5 Q. B. 453.

his bakery was to put into the oven 4 lb. of dough, but the loaf was not weighed after baking. The appellant sold at 6*d.* each six loaves which varied in weight, but all but one weighed 3½ lb. It was held that the appellant was rightly convicted of selling otherwise than by weight. In the discussion of that case I may say every argument which was advanced here on behalf of the respondent was put forward on behalf of the appellant, and the very passage so much relied upon by Mr. Henry, in the judgment of Lord Blackburn in *Jones* v. *Huxtable* (1), was quoted by the counsel for the appellant. The passage to which I refer is where he is represented to have said if the sale had been a sale of a 4 lb. loaf, it would not have been within the statute. This proposition, if divorced from its context, might perhaps have the signification sought to be ascribed to it by Mr. Henry; but, looking at the context, it is plain that the learned Judge did not intend to affirm such proposition. However, it was cited in the argument of *Hill* v. *Browning* (2), and though not referred to in their judgment, was not adopted by the learned Judges who decided that case, in the sense sought to be ascribed to it by counsel for the respondents here. I may also mention that in the evidence of the witness, Thomas Moore, in the case of *Hill* v. *Browning* (2), the inconvenience of an obligation to weigh bread at or before the time of sale was pointed out. After a very elaborate argument Mr. Justice Mellor, in delivering the first judgment, said:—"I am satisfied that the conviction ought to be affirmed. There was evidence before the justices that the loaves never had been weighed as bread; it was distinctly proved by the appellant's foreman that it is the custom for the appellant to put into the oven 4 lb. of dough for a 3½ lb. loaf. One baker may allow a certain amount for evaporation, and another a different amount; but the statute was passed to do away with all such speculations, and it enacts it shall be an offence to sell bread otherwise than by weight; it was intended to secure to the purchaser, not the weight of a certain quantity of dough, but of bread. The bread never was weighed, and on the facts the justices were right in coming to the conclusion that the appellant did sell otherwise than by weight."

(1) L. R. 2 Q. B. 460, at p. 464. (2) L. R. 5 Q. B. 453.

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The point of the judgment was that the loaves were never weighed as bread, the precise condition that obtains in the present case. The case must go back to the magistrates with a direction to convict the defendants, and the costs of the argument must be paid by them.

MADDEN, J. :—

A sale of goods by weight implies that the goods so sold shall be at some time weighed, and when a portion only of certain goods so sold had been actually weighed and the remainder was taken away by the purchaser, it was held that the property in the goods did not vest in the purchaser until the whole had been weighed : *Simmons* v. *Swift* (1). It is not necessary at common law that the weighing should take place before sale, or before delivering to the purchaser, and it is, of course, open to the purchaser to dispense with weighing by accepting the seller's estimate of weight. If the statute had simply enacted that bread should be sold by weight only and not by measure, and had provided for the buyer a means of verifying the weight by scales to be provided by the seller under a heavy penalty, I should have been disposed to hold that the offence of selling bread "in any other manner than by weight" had not been established in the case before us, although I should have expected that in a statute so framed a penalty would have been added for the offence of selling when the weight was defective. But the Legislature has, in the proviso annexed to the 4th section (which applies to it, as well as to the rest of the Act), interpreted the language which it has employed when prohibiting the sale of bread in any other manner than by weight, as meaning "without previously weighing the same." I can find no difference between the English statute and the Act before us, save that the language of the latter is rendered somewhat more stringent by the addition of the words "and not by measure," and the cases support the conclusion which, apart from authority, I should have drawn from the explicit language of the proviso to which I have referred.

(1) 5 B. & C. 857.

WRIGHT, J.:—

I concur in the judgments which have been pronounced and the conclusions arrived at by my lord and my brother Madden. I unwillingly come to this conclusion, since I am sensible of the great inconvenience which will result from our decision; but I feel myself coerced not only by the language of the 4th section of the Act, more especially of the proviso at the end, but also by the decisions in the cases of *Jones* v. *Huxtable* (1); *The Queen* v. *Kennett* (2); and *Hill* v. *Browning* (3), which appear to me to lay down that a sale by weight means that the weight of the article *as bread* must be ascertained at or previous to the sale, and that it is not sufficient that it should have been weighed in its state as dough.

Solicitor for the appellant: *Joseph Alexander.*
Solicitor for the respondents: *Patrick Maxwell.*

J. G. T.

DELANY *v.* KEOGH (4).

Action of deceit—Fraud—Fraudulent misrepresentation—Concealment of material fact—Sale by auction.

The defendant, an auctioneer, was employed by B., a solicitor, acting on behalf of a client, to sell a publichouse. The defendant published an advertisement, the instructions for which he received from B., in which the premises were described as "held under lease for a term of years, at £25. A rent of £18 yearly has been accepted by the landlord for several years in lieu of said rent of £25. The rent, license duty, and taxes, are less than 11*s.* weekly." This calculation was made on the basis of the yearly rent being £18. The lease contained a covenant against alienation without the landlord's consent; but the defendant was not aware of this. Some days before the auction the landlord wrote to the defendant a letter, stating that in future he would insist on payment of the higher rent. The defendant consulted B. as to what

(1) L. R. 2 Q. B. 460. (2) L. R. 4 Q. B. 565. (3) L. R. 5 Q. B. 453.
(4) In the King's Bench Division, before PALLES, C.B., and ANDREWS and JOHNSON, JJ.

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course he should adopt, and B., being of opinion that the landlord was estopped from recovering more than £18 a-year, instructed the defendant to proceed. The defendant believed this opinion to be correct. At the auction the defendant read the statement as to the rent without comment. The plaintiff was declared the purchaser, at £430. The plaintiff believed that the landlord could recover the full rent, but thought he would be content to receive the reduced rent. The landlord subsequently sued the plaintiff for the full rent, and the plaintiff was obliged to pay.

In an action for deceit against the auctioneer, which was tried before Wright, J., without a jury, judgment was entered for the defendant:—

Held, by Palles, C.B., and Johnson, J. (*dissentiente* Andrews, J.), that, on the evidence, the defendant had no intention to deceive; that he did not state what he knew to be untrue, and that the statement was made in the honest belief that it was true; and that the defendant was not liable.

Held, by the Court of Appeal (reversing the decision of the majority of the King's Bench Division), that the statement in the advertisement, and in the particulars of sale, implied a representation that the vendor had no reason to believe that the reduction in the rent would be discontinued; that the case was not one of mere suppression, but that it involved misrepresentation; and that the defendant was liable for damages.

Derry v. *Peek* (14 A. C. 374) distinguished.

ACTION to recover damages for deceit and false representation.

The action was tried before Wright, J., without a jury, when the following facts were proved:—

By lease, dated the 27th October, 1865, the Rev. George Bradley demised to Edward Keating a house and premises, to which a license was attached, at Tallaght, in the county of Dublin, for sixty-one years, subject to the rent of £25 per annum. The lease contained a covenant against alienation without the landlord's consent.

For over twenty years the landlord had accepted £18 a-year as rent, in lieu of £25. In February, 1903, Mrs. Martin, in whom the lessee's interest was vested, instructed Mr. Bradley, a solicitor, to sell the house, and Bradley employed the defendant, who was an auctioneer. The advertisement, which was prepared from information supplied by Bradley, after describing the premises and the lease, stated—

"The above property is held under lease for a term of sixty-one

years, at £25 per annum. A rent of £18 yearly has been accepted by the landlord for several years in lieu of the rent of £25.

"The rent, license duty, and taxes, are less than 11*s.* weekly."

On the 2nd March, 1903, Mr. Tench, the landlord, who had purchased the reversion in July, 1893, wrote a letter to Keogh, in which he stated—

> "The rent of licensed house is £25 a-year, according to the lease. When the Martins were paying the rent themselves, they represented they were very poor. It is a different thing now, when the purchase-money will probably go to pay off a brewery Company, and I insist upon the rent in future being paid in accordance with the lease."

This letter was written in consequence of an intending purchaser having called upon Mr. Tench, about acceptance of the ordinary rent. Keogh forwarded the letter to Bradley, and asked for instructions as to what he should do, and Bradley gave it as his opinion that the landlord could not recover the higher rent, and directed Keogh to proceed with the sale. The grounds for Bradley's opinion were—his firm had been the landlord's solicitors, and acted as receivers; they had received the rent at £18 a-year; they had enforced payment by ejectment for non-payment of the rent at £18 a-year only; and they had sold the landlord's interest to Tench, as an £18 holding.

The auction was held on the 6th March, 1903, and the plaintiff, having seen the advertisement of the sale in the newspapers, attended the auction on the 6th March. The defendant read out the particulars of sale without comment, adding that it was a cheap place; and after several biddings, the plaintiff was declared the purchaser at £430. The plaintiff believed that he was buying subject to the rent of £18, and that he would not be called on to pay more, and stated that if he had known that the landlord would have insisted on the full rent of £25, he would not have bid more than £300. On cross-examination he stated that he knew the rent in the lease was £25 a-year; that he thought the landlord would be content with £18, but that he could insist on the full rent. The plaintiff had consulted his solicitor, Mr. Moran, before the auction. The plaintiff did not know, until he got a letter from Tench, on the 21st October, demanding payment, that he would insist on the full rent of £25.

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Mr. Moran stated in evidence that he knew the tenant was liable to pay £25, and that there was no obligation on the landlord to take less, but that he thought the less rent would be taken. He told the plaintiff that he could be called on to pay the full rent reserved. The value of an increased liability to £7 a-year for the residue of the term was calculated by an actuary at £110.

Arthur Bradley, the solicitor for Mrs. Martin, proved that his opinion was that Tench was estopped from claiming more than £18. Richard Bradley, his uncle, was previously the landlord, and his firm acted as his solicitors and rent-collectors. On the 8th October, 1891, a civil-bill ejectment for non-payment of rent was issued, and in June, 1892, a second ejectment was brought and a decree was obtained. In both of these the rent was stated to be £18.

The defendant proved that the advertisement was prepared from information supplied by Bradley; and he knew nothing about the covenant against alienation; that when he consulted Bradley as to Tench's letter, he believed Bradley's statement and acted on his opinion. He thought the rent was £18 a-year and no more. On cross-examination, he said it would have been material to have let those at the auction know of Tench's determination to enforce the higher rent. He thought he would have got the same bid even if he had read out Tench's letter, but it would probably have had an effect on those attending the sale.

On the 26th October, Tench wrote a letter claiming £25, a year's rent down to 29th September, 1903; and he issued a writ against the plaintiff for the amount: the plaintiff paid the amount and costs.

Plaintiff having brought this action against Keogh for fraud, the case was tried by Wright, J., without a jury, when judgment was entered for the defendant. The plaintiff moved in the King's Bench Division to set aside the judgment, and enter judgment for the plaintiff with such damages as the Court might think just.

Moriarty, K.C., and *Thomas Harrison*, for the plaintiff:—

It is clear that the plaintiff was induced to enter into the contract of purchase by the representations that the outgoings of the premises were less than 11*s.* a-week, and that the rent actually payable was £18 a-year. The defendant was under an obligation to communicate to intending purchasers the fact that the landlord had intimated his intention in future to require payment of the higher rent. The plaintiff was entitled to be put into possession of the entire facts in order to make up his mind whether he would purchase or not. The statements made were intended to produce the impression upon the mind of a purchaser that the rent payable was £18, not £25, so as to induce the payment of a higher price. The statement as to the landlord having accepted the rent of £18 for several years was literally true in itself, but required qualification to prevent a false inference being drawn from it. It was not so qualified, and that omission was deliberately made with the intention to mislead purchasers. The defendant cannot shelter himself behind the belief of Bradley. Even if the latter were correct in assuming that the landlord was estopped from requiring payment of the higher rent, the full facts should have been disclosed; no one should be allowed to purchase premises with a lawsuit attached.

The moral fraud consisted in the defendant's knowledge that if he had said, "The landlord refuses in future to accept the lower rent," there would have been no sale, or a sale at a lower price. There was actual fraud, having regard to the character of the representations made; and this fraud being an inducing cause to the contract, and intended to be such, a cause of action results: *Arnison* v. *Smith* (1); *Smith* v. *Chadwick* (2).

The defendant having published these conditions of sale containing false representations, known to him at the time to be false, is responsible for the loss sustained by the plaintiff, who was induced to purchase by the false misrepresentations: *Andrews* v. *Mockford* (3). This was not a case of mere non-disclosure.

There was "such a partial and fragmentary statement of

(1) 41 Ch. D. 348. (2) 9 A. C. 190. (3) [1896] 1 Q. B. 372.

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fact, as that the withholding of that which is not stated makes that which is stated absolutely false": see judgment of Lord Cairns in *Peek* v. *Gurney* (1); *Pasley* v. *Freeman* (2); *Lee* v. *Jones* (3).

The Court requires good faith in conditions of sale, and looks strictly at the statements contained in them: *Dimmock* v. *Hallett* (4). There the misrepresentation relied upon entitled the petitioner to be discharged from his contract. So in *Stanley* v. *M'Gauran* (5), Palles, C.B., says (p. 335):—"The rule in reference to conditions of sale is that every matter of fact stated in a condition of sale must be reasonably true." The purchaser was not bound to communicate with the landlord to ascertain whether he would continue to accept the lower rent. "When a material misrepresentation exists, the allegation of deceit must be met by proof of actual knowledge as contrasted with constructive or imputed notice. Contributory negligence has no place amongst the pleas to such an action": *per* Fitz Gibbon, L.J., in *Stanley* v. *M'Gauran* (5), at p. 343.

The non-performance of the moral duty incumbent on the defendant to disclose the true facts of the case amounted to actual fraud, and this, accompanied by actual damage, gives a cause of action: *Lee* v. *Jones* (3). [On the question of damages, they referred to *Richardson* v. *Mellish* (6).]

Ignatius J. O'Brien, K.C., and *James O'Connor*, for the defendant:—

The defendant was, on the evidence, innocent of misrepresentation in point of law and in fact. The representations complained of were made by him as agent of Bradley, within the scope of his authority, and with an honest belief in their truth. The defendant was merely agent for the sale of the property. He was guilty of no negligence, and could not have acted otherwise than he did. If, notwithstanding the instructions of Bradley, he had volunteered the statement at the sale that the landlord would

(1) 6 H. L. Cas. 377, at p. 403.
(2) 11 Sm. L. Cas. 64.
(3) 34 L. J., C. P. 131.
(4) L. R. 2 Ch. App. 21.
(5) 11 L. R. Ir. 314.
(6) 11 Bing. 229.

require payment of the higher rent, there would have been no purchaser, and an auctioneer so acting would be liable to actions without end. The question of the landlord's right to the higher rent was one of law, not of fact, and depended upon the construction of documents and the acts of the parties. The defendant was not a lawyer, and availed himself of the only means available to him of arriving at the truth—namely, by consulting Bradley. Bradley himself honestly believed, and was convinced, that the landlord was estopped from requiring payment of the higher rent. He had written to the landlord to that effect, although this correspondence was not known to the defendant prior to the action, and is not evidence against him. Bradley had acted for the original owners of the reversion, and had accepted the lower rent for twenty years. He had also acted as solicitor in the ejectment proceedings at the lower rent. The defendant must have been equally honest in his belief. If a servant combines with his master to knowingly tell a positive untruth to the prejudice of another, and such prejudice follows, the servant is liable equally with the master: *Cullen* v. *Thomson's Trustees* (1). But in the present case both defendant and Bradley acted in good faith. There was no *mens rea*, and in the absence of actual fraud an agent acting within the scope of his authority is not personally liable for a misrepresentation made by him on behalf of his principal: *Eaglesfield* v. *Marquis of Londonderry* (2). The representations made were true according to the knowledge and belief of the defendant: *Brownlie* v. *Campbell* (3). Actual fraud is, therefore, negatived, and the onus rests on the plaintiff of establishing actual fraud: *Derry* v. *Peek* (4); *Patch* v. *Ward* (5). An action for negligent misrepresentation, as distinct from fraudulent misrepresentation, can no longer be maintained: *per* Lindley, L.J., in *Angus* v. *Clifford* (6).

The question is, Did the defendant really believe that the landlord's claim was immaterial?—not whether he believed it was matter that might affect a purchaser's mind. There was no misrepresentation by suppression; the purchaser bought what he

(1) 4 Macq. H. L. 424.
(2) 26 W. R. 540.
(3) 5 A. C. 925.
(4) 14 A. C. 337.
(5) L. R. 3 Ch. App. 203.
(6) [1891] 2 Ch. 449, at p. 463.

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knew might or might not be liable to the higher rent in future. The defendant sold what on the face of the documents was held for a term at the rent of £25. There was, in the view of the purchaser, the chance that the rent might be kept down to £18, and in the view of Bradley, on whose belief and instructions the defendant acted, and of the defendant, the certainty that the landlord was estopped from requiring payment of the higher rent.

As to damages, these could only be nominal, the purchaser having bought a speculation. There would have been a complete answer to a claim for £25 in respect of the first gale of rent due by the purchaser, no prior demand for the higher rent having been made: *Ambrose* v. *Keohan* (1); *Fitzgerald* v. *Portarlington* (2).

Dec. 13.

JOHNSON, J.:—

To succeed in this action, the plaintiff must prove fraud by the defendant, and damage to the plaintiff thereby induced to act on fraud—nothing short of that will be sufficient to maintain the action. Proof of damage without proof of fraud will not suffice. The plaintiff's case is that he sustained damage by having been induced by the defendant's false and fraudulent misrepresentations and false and fraudulent concealment of facts known to the defendant to purchase a leasehold public-house and three acres of land at a public auction for a price larger than he would otherwise have given.

For the purpose of the present action, I dismiss from consideration the class of authorities in which equity relieves from contracts on the ground of misrepresentation—to which some of the cases cited in argument apply. There is a distinct cleavage between that class of authorities and those by which the case in hand is now to be determined, and in which, as I understand the law, the authorities establish that the alleged fraud must be such as would sustain an action for deceit, viz., *mala fides*—intentional deceit to deceive the plaintiff, which is a question of fact on the evidence, and is of the very essence of the alleged cause of action. A statement untrue in fact, but made without *mala fides*, and in the honest belief that it is true, is not evidence of fraud, although made

(1) 17 I. L. T. R. 7. (2) 1 Jones, 431.

through want of care or even through negligent carelessness or without reasonable grounds for belief in its truth, provided always it is made without *mala fides* and in honest belief of its truth. Of course it is not sufficient for a person making a representation to induce another to act on it, and who does act on it, to say I honestly believed what I said was true. The grounds on which the honest belief is really entertained and *mala fides* is absent necessarily depend on the facts of the particular case; and it is obviously of the last importance to investigate and ascertain whether on the evidence the person making the representation has really such honest belief. The authorities supply some tests.

For instance, if a person states what he knows to be false to induce another to act on that statement, it is plain that he has no honest belief in his statement; if he wilfully shuts his eyes to the facts, or purposely abstains from inquiry into them, no reasonable person would in such circumstances infer he had any honest belief in the matter. For the present purpose it is not necessary to multiply illustrations. False and fraudulent misrepresentation to induce another to act on it may be effectuated by *mala fide* active concealment (so to speak) with intent to deceive as by actual *mala fide* false statement. The same principles are equally applicable to such cases, whether the concealment is of a fact, or part of a fact, or by apparent disclosure of a fact, while there is *mala fide* concealment of that which, if disclosed, would put a wholly different complexion on the disclosure, and show what only is disclosed is false, and fraudulent, and dishonest, because it was not the whole truth.

> "A lie which is all a lie may be met and fought with outright;
> But a lie which is part a truth is a harder matter to fight."

In all such cases the question is whether the representation is effected by actual statement or actual concealment; whether it was made dishonestly and intentionally to deceive another, and with intent that the other shall act on it, and so as to induce him to act on it; or whether it was made *bona fide* in the honest belief of its truth; and the solution of this question depends on the evidence in the particular case in which it lies on the plaintiff to prove the alleged fraud and damage.

The defendant is an auctioneer, and not a lawyer. Before the

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present landlord (Tench) acquired the property, subject to the lease in question, Edward Bradley, grandfather of Arthur Bradley, the solicitor, was the landlord and reversioner for many years of the lease, and Arthur Bradley was the solicitor and rent-collector, and personally and intimately acquainted with the circumstances of the property and with the lessees in the lease in question. For upwards of twenty years the rent of £18 was received from the lessee in place of the rent of £25 reserved by the lease. In 1891 and 1892 civil-bill ejectments for non-payment of the rent of £18 were issued by Arthur Bradley's firm against the lessee and decrees recovered, and following those decrees the yearly rent of £18 was uniformly demanded and received from the lessee in place of the yearly rent of £25 reserved in the lease.

In this state of things, Martin, the lessee, instructed Arthur Bradley, in 1903, as her solicitor, to sell the lessee's interest in the lease. Bradley, who knew all the circumstances, employed the defendant, an auctioneer of standing and repute in Dublin, to sell it by public auction, and gave the defendant the particulars to prepare the advertisement and posters for the sale. The defendant knew nothing of the premises or the title but from these particulars so supplied to him by Bradley. The defendant drafted the advertisements and posters, and submitted the drafts to Bradley, who approved of them, and the advertisements were published in the *Freeman's Journal*, of the 23rd of February and 2nd March, announcing the sale of the premises by auction on the 6th March. These advertisements are identical with the particulars used at the auction, and it is not disputed they were then accurate and true. Bradley prepared the particulars and conditions of sale, and gave them to the defendant to use for the auction. On the 3rd March the defendant received Tench's letter of the 2nd March, and forthwith sent a copy of it to Bradley, as was his duty. The defendant then at once had an interview with Bradley, and asked him what he was to do having regard to Mr. Tench's letter. Bradley told him that, in his opinion, Tench could not recover more than £18 a-year for the rent, and directed the defendant to proceed with the sale as advertised and according to the particulars and conditions of sale which he had given him. I do not stop to discuss whether this opinion was correct or not. The defendant,

who was not a lawyer, *bona fide* inquired from Bradley, the solicitor who employed him, and who was the best source of information accessible to him, what he ought to do in the circumstances. This was the defendant's reasonable and proper course to pursue. Bradley was a solicitor, and personally acquainted with all the facts. Bradley, as a lawyer, gave the defendant his opinion that no more than £18 a-year could be recovered, and directed him to proceed with the auction under the published advertisements and particulars and conditions of sale. The defendant states:—"I believed Bradley's statement, and acted on his opinion. I thought the rent was £18 a-year and no more, outgoings eleven shillings weekly, on the basis that the rent was only £18." The defendant also says that no authority was given him to alter the particulars, and he sold the premises by Bradley's orders under the published particulars and conditions of sale, which he read then at the auction, without comment or alteration. He believed they truly represented the state and condition of the subject-matter of the sale, and Mr. Justice Wright, who saw and heard all the witnesses, with his experience at the Bar and on the Bench, believed the defendant. I think the decision of the House of Lords in *Derry* v. *Peek* (1), both on the facts of the case and in law, practically covers the present case.

The defendant knew nothing of the correspondence between Tench and Bradley, and it is not evidence against him.

I fail, on the facts, to discover any intention on the part of the defendant to deceive any person, either before or at the auction; he appears to me to have been honest and straightforward in the matter.

That the plaintiff knew his position appears to be shown by his evidence of what took place at the time of the execution of the assignment. The plaintiff, with Mr. Moran, as his solicitor (and who is his solicitor in the action), and Bradley as solicitor for Martin, the vendor, were all present—the assignment was read. The plaintiff says:—"I knew the rent in the lease was £25 yearly, I thought the landlord would be content with £18, but I knew he could insist on the full rent. I heard the deed read; I understood

(1) 14 A. C. 337.

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it. I instructed Moran (plaintiff's solicitor) before the auction; he was at the auction; he bid for me. I relied on Moran to act for me in the purchase of this place." I think the plaintiff discloses his real grievance—he says:—"It" (the business) "is not as good as I thought, the house has gone down in business." "I hoped he" (the landlord) "would allow £18, and knew he could insist on £25."

Mr. Justice Wright, at the trial without a jury, was the tribunal to decide on the credibility of the evidence. His judgment involves that he considered and found on the evidence of the witnesses before him, which he has reported, that there was no fraud on the part of the defendant, and that the defendant's conduct throughout the matter was based on his honest belief without any intention to deceive anyone. In my opinion there was evidence to sustain this finding and judgment for the defendant in fact and law, and I think the verdict and judgment ought to stand.

ANDREWS, J.:—

This was an action for a false and fraudulent representation made by the defendant to the plaintiff of a material matter, whereby the plaintiff was induced to pay a larger price that he would otherwise have given for the interest under a lease of a certain licensed house and premises sold to the plaintiff by the defendant, as the auctioneer thereof, at a sale by auction.

The plaintiff's contention was that the representation in question was involved in the following statement in the particulars of sale which were read out by the defendant to the plaintiff and others at the auction:—"The above property is held under lease for a term of sixty-one years at £25 per annum. A rent of £18 yearly has been accepted by the landlord for several years in lieu of the said rent of £25. The rent, license duty, and taxes are less than eleven shillings weekly" (which was on the basis of the yearly rent being £18).

In my opinion, these statements involved, to the knowledge of the defendant, a representation that it was reasonably likely that the landlord would continue, for at least some time, to accept the lower rent.

The sale by auction was upon the 6th March, and on the 3rd March the defendant received a letter from Mr. Tench, the landlord, of the 2nd March, in which he said, "I will insist upon the rent in future being paid in accordance with the lease"; that is at the rate of £25 per annum. Although it appeared that, at the time the particulars were prepared, the statements that a rent of £18 yearly had been accepted by the landlord for several years in lieu of the rent of £25, and that the rent, license duty, and taxes were less than 11*s.* weekly, were honestly made, they were, in my opinion, obviously made, as the defendant must have known, in order to enhance the value of the subject-matter of the sale by leading bidders to entertain a reasonable expectation that for some time at least the lower rent would be accepted by the landlord. At the time, however, when the defendant made these statements at the auction to intending bidders, he knew that the landlord would insist on the full rent of £25 being paid in future. On receipt of the landlord's letter of 2nd March, the defendant wrote, on the 3rd March, to Mr. Bradley, the vendor's solicitor, sending him a copy of the landlord's letter. An advertisement of the sale had been previously published, which also contained the statements in question; and in this letter of the 3rd March, the defendant told Mr. Bradley that an intending purchaser had called upon the landlord about acceptance of the ordinary rent as payable by the vendor. I think it clear that the defendant knew that the statements in question might be thought material by intending purchasers when one of them had been evidently led thereby to make enquiry from the landlord on the subject of the rent. I need scarcely say that if a representation is made to induce another to act upon it, he is not bound to discredit it or investigate its truth before acting on it. He is entitled to adopt it as true on the faith that the person who made it told the truth in relation to it. It was urged, in argument on behalf of the defendant, that Mr. Bradley told him, after receiving the landlord's letter of the 2nd March, that he (Mr. Bradley) believed the landlord could not recover more than the £18 a-year, and to go on with the auction. The defendant stated in his evidence that he accordingly believed that the landlord could not recover the higher rent, and acted on

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Mr. Bradley's opinion. The defendant did not state that Mr. Bradley had expressly prohibited him from letting bidders at the auction know what the landlord had written, and Mr. Bradley stated in his evidence that although he knew of the landlord's expressed intention to enforce the full rent, he thought he could not do so, but added, "I think he (the plaintiff) should have been told of Tench's (the landlord's) claim," and the defendant in his cross-examination said, "It would have been material to have let those at the auction know of Tench's determination to enforce the higher rent. It would probably have had an effect on those attending the sale." And by way of excuse apparently for not letting the landlord's determination be known to those who attended the auction he added, "I acted on Bradley's directions to me to go on with the sale." Even if those directions were, or were understood by the defendant to be, to go on with the sale without disclosing the landlord's determination to enforce the higher rent, they could of course in no way justify the defendant in knowingly misleading intending purchasers.

It was suggested in the argument that the evidence of the defendant, which I have last quoted, had reference to what occurred after the sale, viz., that the landlord had actually enforced the higher rent; but I am unable to limit his evidence in this way. I think that it is plain that he knew at the time of the sale that it would have been material to let bidders know of the landlord's determination to enforce the higher rent, and that the knowledge of this would have had an effect on those attending the sale. The defendant was an experienced auctioneer, and I cannot suppose that he did not know that the statements he made from the particulars would tend to enhance the price to be given, as they were plainly intended to do, and that telling the whole truth would have had an injurious effect on the sale.

Even assuming that the defendant (as he stated) believed what Mr. Bradley told him that the landlord could not recover the higher rent, he must still, in my opinion, have known perfectly well that it both was and would be regarded by a purchaser as material that the landlord had written to say that he would insist on the full rent being paid in future. Information that he had done so would have at once put an end to any expectation by a

bidder that the landlord would continue for any time, long or short, to accept the lower rent, and withholding this information was deliberately keeping back from the bidders the knowledge that (whatever the defendant may have believed the landlord could or could not do) he had intimated that he would insist on the payment of the full rent. The defendant knew, no matter how implicitly he believed what Mr. Bradley told him, that the landlord would insist on payment of the £25 a-year as his right; and I am satisfied that he also knew that a purchaser bidding would be affected by the knowledge of this. It is of course not necessary that a misrepresentation should be made by express words. A statement may be made so as to convey a misrepresentation without actually expressing it. If I am correct in the view I have taken, I do not think there can be any doubt whatever about the law.

The principles on which the decision in *Pasley* v. *Freeman* (1) was grounded have been illustrated by numerous subsequent cases which have left that case to be still the leading case with reference to actions such as the present. The difficulties which have since arisen have not been as to what the law is, but as to its application in particular cases. To sustain an action such as this, there must, no doubt, be fraud; but a false representation made with knowledge of its falsehood in order to induce another to act upon it, is fraud; and if the person to whom it is so made act upon the faith of it to his prejudice, it gives him a cause of action. All the judgments in the recent case of *Derry* v. *Peek* (2), in the House of Lords, recognise this; and Lord Bramwell's observations at p. 348 of the report do not apply, if my view of the case is the correct one; for, in my opinion, the defendant had the *mens rea*—that is, it was present to his mind when he made the statements in question that they would convey to a purchaser, contrary to what the defendant knew to be the fact, that the landlord would be likely for some time at least to voluntarily continue to accept the lower rent; and the defendant knew that this would be material in inducing a purchaser to give a higher price than he would be willing to give if he knew the truth. At page 347 of the report of *Derry* v. *Peek* (2), Lord Bramwell tersely states the law in these

(1) 2 Sm. L. C. 64. (2) 14 A. C. 377.

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words:—"Knowingly and fraudulently stating a material untruth, which brings about wholly or partly the contract, gives a cause of action." I do not regard this case as one of mere suppression. I think it involved misrepresentation; and, in my opinion, the verdict and judgment for the defendant should be changed to a verdict and judgment for the plaintiff with reasonable damages, which I would not be disposed to assess at more than, say, £25, having regard to the fact that the plaintiff, although, as he stated in his evidence, he thought the landlord would be content with the £18, also thought he could insist on the full rent; and the plaintiff, therefore, must have contemplated the possibility at least of the full rent being demanded at any time, and have known that there was no certainty whatever as to the continuance of the acceptance of the lower rent.

PALLES, C.B.:—

At the trial it was proved by the defendant and by Mr. Bradley, the vendor's solicitor, that the defendant brought Tench's letter of 2nd March, 1903 (upon which the plaintiff's case is based), to Mr. Bradley on the next day, and that Bradley gave the defendant his opinion that Tench was estopped from recovering more than £18 a-year. The defendant swore that he believed Bradley's statement, and acted upon his opinion. He was not aware that the lease contained a clause against alienation without the landlord's consent, nor was he aware of any of the correspondence between Bradley or the landlord, or that for any other reason such consent was necessary to the assignment.

The learned Judge (Wright, J.) who tried the case without a jury, by finding a verdict for the defendant, in my opinion, shows that he believed this evidence. He saw the witnesses, heard their examination and cross-examination, and his finding involves a conclusion of fact, that it was not present to the mind of the defendant at the auction that the statement in the particulars might be understood by a bidder as implying that the vendor had no knowledge of the intention of the landlord to insist on the higher rent. It is out of the question that I, who have not seen the witnesses, can, in the teeth of this finding, come to the conclusion, upon such evidence as we have, either that Bradley did not make the state-

ment to the defendant, or that the defendant did not honestly believe it, or that the defendant knew that the last-mentioned meaning might be attributed to the statement in the particulars.

The question as to which we are not unanimous is, as I understand it, not whether the defendant did entertain the honest belief that Bradley's statement was true, and did not know the meaning that might be attributed to the statement in the particulars, but whether, on these assumptions, we can find a verdict against him. I am of opinion that we cannot.

This is not an action to rescind the contract for sale. It is not based upon an innocent misrepresentation. It is, notwithstanding the control by equitable principles of common law doctrines, "the old action of deceit" of the *Pasley* v. *Freeman* (1) type, to sustain which fraud—actual, wilful, intentional deception—is essential. All this, since *Derry* v. *Peek* (2), is elementary learning.

It is argued that I am bound, as matter of law, to come to the conclusion that the defendant intended to deceive, although I am of opinion, as a matter of fact, that he had not that intention, because it is said that he stated that which was material, and which he knew to be untrue. If he did so, I admit the conclusion sought for would follow as a matter of law.

But did he state what he knew to be untrue? I cannot hold that he did, and as to this I distinguish between express and implied misstatements. Had he stated after he had read the letter of the 2nd March, "the landlord has not expressed an intention to enforce the £25 rent," there would have been a statement of fact false to his knowledge; and attributing to him, as we must, an intention that his statement should be acted upon, he must have intended that bidders should act upon his statement, and as a bidder who acted upon this false statement, believing it to be true, must necessarily have been deceived, the law must impute to him the intention of doing that which was the necessary consequence of his act, the deception of the bidder.

But he did not make any such statement as I have supposed. Of the two statements he made, the first was that £18 yearly had been accepted by the landlord for several years in lieu of the rent

(1) 2 Sm. L. Cas. 64. (2) 14 A. C. 337.

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of £25. Literally this was true. But it is said, and no doubt truly, that express words are not necessary to a false representation, that it is sufficient if the defendant knowingly lead the plaintiff to believe in facts which did not exist, and that that result may be arrived at, not only from express words, but from that which was omitted, and from all the circumstances of the case. Although fraudulent concealment will not *per se* maintain the action, it will be otherwise if the matter concealed renders untrue, in a material matter, the express words used in the sense in which, *to the knowledge* of the person using them, they were understood by the person who acted upon them.

But, correlatively, to render a statement fraudulent by reason of the sense in which it is understood by another, it is necessary to arrive at the conclusion that the *defendant*, when making it, *knew* that it would be understood by the other in that sense. If a statement is honestly believed to be true in the only sense in which it presents itself to the mind of the person who made it, an intention to deceive cannot be proved merely by showing that it was capable of being understood, and was, *without his knowledge*, understood in a different sense by a person who was intended to be induced, and was induced, to act upon it. The contradiction between the belief and the representation, which is essential to fraud, can exist only when the thing known is contradictory of the thing represented as understood by him who makes the representation.

Personally, I would draw under the circumstances the inference that the words used implied a representation that the state of things stated to have had a long continued existence, would continue to exist thereafter, for an uncertain, an indefinite, period of time. But that is not sufficient. I should also hold that the defendant did not honestly believe that statement. But if, as I assume, he honestly believed that no more than £18 a-year was recoverable, he did necessarily believe that the previous state of facts—that is, the acceptance of the £18 a-year—would continue, not only for an indefinite period, but during the entire continuance of the lease. The £18 a-year would continue to be taken, because the landlord had no right to enforce any further sum.

But it is argued that the real state of facts that existed, and,

therefore, that which it was to be inferred should continue, was not only an acceptance of the £18 a-year, but its voluntary acceptance, its acceptance without litigation, and that the letter of the 2nd March brought home knowledge to the defendant that this representation was untrue.

But to attribute any weight to this distinction, I should first determine as a fact that the defendant drew it, knew it, and appreciated it, that when he read out the words he knew that they would be understood as meaning that the landlord would voluntarily accept, as distinguished from being bound to accept, the smaller; and secondly that he believed that the landlord would, against right, refuse to accept the only sum he was entitled to receive. In the face of Mr. Justice Wright's opinion of the defendant's honesty, I decline to come to either of these conclusions. I am not bound to hold an ordinary business man fraudulent by reason only that he did not draw a subtle distinction which occurs to a trained logician like Mr. Moriarty, or because he did not believe that an honest man would insist in trying to enforce that to which he was not entitled.

The matter is capable of being looked upon in a broad, common-sense view which is perfectly consistent with the defendant's honesty. He was dealing with actual value. A representation was made in the particulars that there was a reasonable probability that the smaller rent would be received for a time. He is told that the landlord will insist on the higher rent. The vendor's solicitor retorts that he has no right to insist on it. The defendant believes that. He believes that the purchaser will be not only in the position represented by the particulars, but even in a better one, that he will be entitled to the reduction not only for the indefinite time represented, but for ever. It must never be left out of consideration that the defendant was not aware that the lease contained a covenant against alienation without the landlord's consent, or that he had refused, or might refuse, to consent, in the absence of an agreement by the plaintiff to pay the original rent. If it be said that the defendant should have made more precise enquiry from Bradley, or should have altered the wording of the particulars, the answer is that an absence of due care, even were there such (as to which I say nothing), would not be sufficient to maintain the action.

As to the second representation relied on, "that the rent, license

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duty, and taxes are less than eleven shillings a-week," it would be true if the landlord could not recover more than the £18 a-year, and, as the assumption on which I proceed is that the defendant believed no greater sum to be recoverable, he believed this statement.

It would serve no useful purpose for me to refer to cases, as I believe the law applicable to be quite settled. In my opinion the motion to change the verdict should be refused with costs.

R. ST. J. C.

Appeal. 1905.

Jan. 14, 20, 23. Feb. 28.

The plaintiff appealed (1).

J. F. Moriarty, K.C., and *T. Harrison*, for the appellant.

Ronan, K.C., *O'Brien, K.C.*, and *James O'Connor*, for the respondent.

The judgment of the Court of Appeal was delivered by—

Feb. 28.

HOLMES, L. J.:—

The difficulty in this case arises in applying old and well-settled principles of law to an unusual state of facts. There is no doubt that to sustain an action for misrepresentation, there must be proof of fraud on the part of the defendant. It is, I think, equally certain that fraud is proved when it is shown that the defendant made the misrepresentation, knowing it to be false. To use the words of Lord Herschell, in *Derry* v. *Peek* (2):—"To prevent a false statement being fraudulent, there must always be an honest belief in its truth." To these propositions I add another, suggested by the peculiar facts of the present case. It is not necessary that the misrepresentation which will sustain an action of deceit should be made in actual terms. Words may be used in such circumstances, and in such a connexion, as to convey to the person to whom they are addressed a meaning or inference beyond what is expressed; and if it appears that the person

(1) In the Court of Appeal, before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

(2) 14 A. C. 374.

employing them knew this, and also knew that such meaning or inference was false, there is sufficient proof of fraud.

Of course whether the misstatement be express or implied, the plaintiff must show that he has suffered loss by acting on it; but in the foregoing observations, I have only dealt with the mode of proving the defendant's fraud, which is an essential element in the cause of action.

Mr. Keogh, a well-known auctioneer in this city, was employed by Mrs. Martin, a publican, to sell by auction her licensed premises. He was supplied by Mr. Bradley, Mrs. Martin's solicitor, with the necessary particulars; and he published an advertisement, in which the property was described as "held under lease for a term of sixty-one years, at £25 per annum. A rent of £18 yearly has been accepted by the landlord for several years in lieu of the said rent of £25. The rent, licence duty, and taxes, are less than 11*s.* weekly"—a calculation made on the basis of the yearly rent being £18. It is, I think, impossible to mistake the meaning of these words. They do not mean that the rent of £25, reserved by the lease, was subsequently legally reduced to £18. They mean that, although the original rent had not been altered, the landlord had, for several years, voluntarily accepted a smaller sum in lieu thereof. The statement was not made for the purpose of informing a would-be purchaser of a past incident with which he was not concerned. It was intended that he should draw the inference that the reduction hitherto made would probably be continued, and, in my opinion, it clearly implied a representation that the vendor had no reason to believe that it would be discontinued. A gentleman of Mr. Keogh's experience knows how usual it has been in Ireland for a landlord to allow, year after year, an abatement in a tenant's rent, and how rarely in such cases it happens that the full rent is insisted on, without a marked change of circumstances, and ample previous notice. I have no doubt that this was in the defendant's mind when he published the advertisement, and that his expectation was that a similar consideration would naturally influence bidders at the auction in their estimate of the value of the premises. Up to this point, there can be no doubt of the defendant's honesty and candour. He not only believed, but he had good grounds for believing, everything that

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the particulars of sale expressed or implied. Some days before the auction, however, an intending bidder, seeing the importance of the statement as to the rent, determined, if possible, to convert expectation into assurance; and having found out who the landlord was, he inquired from him whether the abatement would be continued. I presume the answer was a decided negative. At all events this enquiry brought the terms of the advertisement to the notice of the landlord, who, for the very purpose of preventing people from being misled by it, wrote at once to the defendant. There is no ambiguity in this letter. Mr. Keogh is told in the clearest terms that thenceforth the full rent would be insisted on. The defendant understood perfectly the significance of this intimation, and brought the letter to Mr. Bradley. That gentleman, who had some previous knowledge of the property, did not hold out any hope that the landlord could be induced to alter his determination to insist on the full rent. On the contrary, this seems to have been assumed; but Mr. Bradley gave an opinion that the landlord was estopped from recovering more than £18. No change was made in the particulars of sale; and the defendant opened the auction, which took place two or three days later, by reading the statement as to rent already quoted without any comment, beyond saying that it was a cheap place. The plaintiff, in ignorance of the landlord's intention, was declared the purchaser at the price of £430; and in the abstract of title, furnished by Mr. Bradley, there was no reference to the amount of rent having been affected by the doctrine of estoppel. The first notice that the plaintiff had of the landlord's intention to insist on the full sum of £25, was some months after the completion of the purchase, when a demand therefor was followed by a writ, to which, of course, there was no defence.

The question is whether, in the foregoing circumstances, the particulars of sale, taken in connexion with the suppression of the contents of the landlord's letter, showed fraud of the kind that entitles the plaintiff to recover in an action of deceit such damages, if any, as he sustained therefrom?

Let me present the case in a way suggested by Mr. Ronan. Let me assume that the defendant, after he received the particulars from Mr. Bradley, but before he made them public, had ascer-

tained from the landlord that he would insist on the full rent for the future, would it not have been manifestly dishonest to frame the advertisement as he did? His doing so would be an example of the trick described by Lord Blackburn in *Smith* v. *Chadwick* (1); "If, with intent to lead the plaintiff to act upon it, they" [*i.e.* the defendants] "put forth a statement which they know may bear two meanings, one of which is false to their knowledge, and thereby the plaintiff, putting that meaning on it, is misled, I do not think they can escape by saying he ought to have put the other. If they palter with him in a double sense, it may be that they lie *like* truth; but I think they lie, and it is a fraud. Indeed, as a question of casuistry, I am inclined to think the fraud is aggravated by a shabby attempt to get the benefit of a fraud without incurring the responsibility." But the information, which would have made the statement fraudulent if it had been obtained before the advertisement was issued, reached the defendant in time to enable him to prevent persons attending the auction from being misled; and the fact that the landlord communicated with him as auctioneer ought to have impressed, and I am sure did impress, him with the importance of correcting the false inference which his language was calculated and intended to convey. All that was necessary for Mr. Keogh to do was, after reading the particulars at the auction, to have added, that since they had been prepared the landlord had expressed his intention to insist on the rent of £25, but that the vendor's solicitor was of opinion that he was legally estopped from obtaining more than £18. He did not do this. He allowed the sale to proceed on the basis that the reduced rent might be voluntarily received in the future as in the past, or, at least, that he knew nothing to the contrary.

How does the defendant himself account for this? His evidence on this point is clear:—"The conditions were Bradley's. I did not get authority to make any change. I was selling under Bradley's orders. I acted on Bradley's directions to me to go on with the sale." In other words, an intelligent auctioneer, who admits that "it would have been material to have let those at the auction know of Tench's determination to enforce the higher

(1) 9 A. C. 201.

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rent," kept back this information, because the solicitor under whose orders he was acting did not authorise him to disclose it or make any change in the particulars. In matters of truth and falsehood, of honesty and dishonesty, our law requires a man to judge for himself, and will not allow him to escape responsibility by pleading that he was carrying out the directions of another. Knowing that he could not thus free himself from liability, his counsel relied on his belief in the soundness of Mr. Bradley's legal opinion. I accept Mr. Keogh's statement that he believed what he was told by the solicitor, although this was not his reason for suppressing Tench's letter, and although the solicitor himself had not ventured to state it in the particulars of sale; but the defendant must have understood the difference between a landlord accepting voluntarily an abated rent, and a tenant being forced to fight for the abatement in a doubtful lawsuit. I do not understand either the legal or ethical aspect of Mr. Ronan's argument on this point.

I have observed, not for the first time, in the discussion of this case the prevalence of an idea that *Derry* v. *Peek* (1) has laid down a new rule in actions of deceit, and has given a latitude to falsehood that did not previously exist. This seems to me to be a great mistake. The directors of a Tramway Co. that had authority to use steam power with the consent of the Board of Trade, believing that this consent would be given as a matter of course, issued a prospectus in which it was stated that they had the right to use steam power without reference to any condition. It was held that this was not actionable, inasmuch as the statement was made in the honest belief that it was true. This is, I think, old law; but if the directors had known, before they issued the prospectus, that the Board of Trade had refused to consent, or had announced its intention to refuse, the case would have been like this, and the directors would have had no defence; nor in such case would their position have been improved if their solicitor had assured them that there would be no difficulty in obtaining from Parliament an amending Act removing the condition.

I am satisfied that when the defendant read in his auction

(1) 14 A. C. 337.

mart to the assembled bidders the particulars of sale, unaccompanied with a statement that there would be no longer a voluntary abatement of the rent, he was knowingly deceiving them, and that the natural effect of the deception was to obtain a higher price for the publichouse than it was worth.

I believe that the plaintiff's bid of £430 was considerably higher than what he would have offered if he had the knowledge which the auctioneer possessed; and than the real value of the premises.

The measure of damages is the difference between such real value and £430; and on this point the evidence is not satisfactory. The plaintiff says that if he had known that he would be obliged to pay the full rent, he would not have bid more than £300, but I am of opinion that the premises, subject to £25 a-year, were worth more than £300. There is evidence that the present actuarial value of an increased liability of £7 during the residue of the term would be £110. But £430 was bid on the basis, not that the rent was £18 and no more, but that the landlord might voluntarily accept the same sum in the future as in the past. The extent to which the £110 ought to be reduced by reason of this element of chance, is one of those problems which juries are obliged to answer every day in assessing damages. A jury in this case would probably regard the chances as even, and find a verdict for £55 by the familiar method of splitting the difference. I should be prepared to adopt this amount, especially as it is the figure at which I have arrived by a different mode of calculation; but the other members of the Court consider it to be somewhat excessive; and if there is any subject on which there ought to be "give and take," it is that of damages. We have, therefore, fixed the sum for which judgment is to be given at £40.

Solicitors for the plaintiff: *J. & J. Moran.*
Solicitor for the defendant: *M. Cartan O'Meara.*

R. D. M.

K. B. Div. 1904.
Nov. 7, 14.

SARA MEHAFFEY *v.* DAVID MEHAFFEY (1).

(1904. No. 574.)

Practice—Setting aside judgment—Application by a person not party to the record—Order XVI., Rule 11—*Order XXVII., Rule* 16.

Where, in an action against an administrator of a deceased intestate for money alleged to have been paid by the plaintiff for the use of the deceased, judgment was allowed to be marked by collusion between the plaintiff and defendant:—

Held, that a next-of-kin, not a party to the record, whose interest in the assets of the deceased was prejudicially affected by the judgment, had such a specific interest in the assets of the deceased as to entitle him to an order in the action, setting aside the judgment, and giving him leave to intervene.

This was an application, made on behalf of Hugh Mehaffey, for liberty to intervene in the action; and that the judgment in the action dated 28th January, 1904, and all subsequent proceedings taken therein, should be set aside, and that the said Hugh Mehaffey should be at liberty to appear and defend the action upon entering into security before a Master of this Division to indemnify the defendant against the future costs thereof.

The applicant, Hugh Mehaffey, and the defendant were sons of one Eliza Mehaffey, who died on the 6th December, 1899, having by her will, dated 1st May, 1899, devised her farm of 20 acres, held by her as a judicial tenant, and the chattels thereon to the plaintiff and defendant during their natural lifetime, charged with the payment of £50 in favour of her son Matthew. There was an intestacy save as regards the said life-interests of the plaintiff and defendant; and the present applicant was entitled, as one of the next-of-kin, to a share of the personal estate of the said Sara Mehaffey, subject to the life-interests of the plaintiff and defendant. Letters of administration with the will annexed of the said Eliza Mehaffey were granted to the defendant on the 20th November, 1900.

(1) Before Boyd and Kenny, JJ.

The action was brought by the plaintiff against her husband, as administrator of Eliza Mehaffey, to recover the sum of £78 6*s.* 11*d.* for money alleged to have been paid and expended by the plaintiff for the use of the said Eliza Mehaffey at her request (1). No appearance was entered to the writ of summons, and on the 28th January, 1904, judgment was entered for the plaintiff for the sum claimed, with £5 16*s.* costs, to be levied off the goods and chattels which were of the said Eliza Mehaffey at the time of her decease in the hands of the defendant. On the 8th February, 1904, the defendant, as personal representative of Eliza Mehaffey, executed a mortgage of the farm to the plaintiff as security for the amount of the judgment.

The applicant alleged that the plaintiff and defendant were living together on good terms; that the action was a fraudulent and collusive one, brought to defeat the claims of those entitled to the lands in remainder, and that his interest in the lands was injuriously affected by the collusive judgment and mortgage. The plaintiff alleged that the action was *bona fide*; that the money claimed was actually expended by her in building a better house for Eliza Mehaffey during her lifetime, and that the delay in bringing the action was accounted for by the understanding that she and the defendant were to get the lands absolutely under the will of Eliza Mehaffey.

S. L. Brown, K.C., and *Cusack*, for the applicant:—

It is clear the judgment was obtained by fraud and collusion between the plaintiff and defendant. That being once established, the applicant is entitled to have it set aside, his interest, as one of the next-of-kin, being injuriously affected by the judgment, if allowed to stand. That he is not a party to the record is immaterial: *Jacques* v. *Harrison* (2); Order XXVII., Rule 16.

Matheson, K.C., and *Williamson*, for the plaintiff:—

The applicant has no *locus standi* in the present action. His claim to a share of the assets, as one of the next-of-kin, gives him

(1) This claim was statute-barred at the date when the action was brought.
(2) 12 Q. B. D. 165.

K. B. Div. 1904. MEHAFFEY v. MEHAFFEY.

no such specific interest as would entitle him to the order sought for. His proper course would have been to have proceeded in the Chancery Division to set aside the judgment and mortgage: *Tevlin* v. *Gilsenan* (1); *Moser* v. *Marsden* (2).

Nov. 14.

BOYD, J.:—

Two points arise in this case for our decision:—

(1) Was the judgment obtained by the plaintiff so obtained by the fraud and collusion of the plaintiff and the defendant?

(2) Whether the applicant has any *locus standi* in this Court to dispute the validity of the judgment?

From the facts disclosed in the affidavits, I am clearly of opinion that the judgment was obtained by the fraud and collusion of the plaintiff and the defendant. The defendant and Hugh Mehaffey are two of the sons of Eliza Mehaffey. This lady was possessed of a farm of land, and lived in the house or cottage thereon. Her son, the defendant, lived in the house with his mother, and managed the farm for her. The applicant and the other children of Eliza Mehaffey had not resided with her for some years. She had lived for very many years in the house, and had attained a great age. In the year 1892 the defendant married the plaintiff, and brought her home to his mother's house on the farm. Almost immediately after the marriage the plaintiff and the defendant considered the old house was not good enough for them to live in, and in consequence commenced the building of a new house on the farm. It is said by them that this building was commenced with the consent of the defendant's mother. However this may be, it is admitted that the old lady, shortly after the building commenced, objected to it, and declared her intention not to live in it, and stated that she would die in the house which she had occupied so long. In consequence of her objections, the building of the new house was discontinued shortly after it was commenced and before much work had been done, and remained in that unfinished condition down to the time of her death, which occurred in December, 1899. At the time of her death she was ninety-two years old. On the 1st May, 1899, she

(1) [1902] 1 I. R. 429. (2) [1892] 1 Ch. 487.

made her will, and devised the farm to the defendant and his wife for their lives, and made no devise of it after their deaths. The defendant, on the 20th November, 1900, obtained letters of administration with the will annexed.

During the lifetime of the old lady, it does not appear that any claim was ever made against her for the expenses incurred in building the new house. However, in January of the year 1904, a writ was issued by the plaintiff against the defendant, to recover from him, as administrator of his mother's estate, the money alleged to have been expended upon the aforesaid building, which, she alleged, she had expended thereon at the request of the deceased. There is no evidence that the plaintiff received any fortune upon the occasion of her marriage, or how she became possessed of any money of her own, and certain it is that no such claim was ever made during the lifetime of the old lady; and it is also clear that at the time the said action was commenced, if the plaintiff had any such claim, it was barred by the statute, and was irrecoverable.

However, the defendant allowed judgment to pass against him by default for the sum of £78 6*s.* 11*d.* In my opinion this judgment was obtained by the fraud and collusion of the plaintiff and the defendant, and for the purpose of defeating the rights of the next-of-kin of the deceased, who are entitled to her estate after the deaths of the plaintiff and defendant. I think the statements in the affidavit filed by the plaintiff to resist this motion are the most conclusive evidence of fraud and collusion.

As to the second point in the case, I am of opinion that the applicant, Hugh Mehaffey, as one of the next-of-kin of the deceased, has a right to intervene, and to apply to this Court to set aside the said judgment. The cases relied on by the plaintiff and the defendant have no application to the facts of this case. It is alleged that if the applicant has any rights, his remedy is in the Chancery Division, and not in this Division. If he proceeded in the Chancery Division, I am of opinion that Division might decline to set aside the Common Law judgment. It might, no doubt, restrain the plaintiff from proceeding on the judgment, but it could not set it aside, and I consider it would be a disgrace on our procedure if a judgment obtained by such palpable fraud as exists

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in this case should be allowed to continue on the files of this Court.

The Court of Bankruptcy has the power to go behind a judgment, and to treat it as non-existing. In the case of *Ex parte Kibble; In re Onslow* (1), Lord Justice James says:—"It is the settled rule of the Court of Bankruptcy that the Court can inquire into the consideration for a judgment debt," and proceeds —"If a judgment were conclusive, a man might allow any number of judgments to be obtained by default against him by his friends or relations without any debt being due." There are many other cases in the reports to the same effect. I am not aware that the Chancery Division has any similar power. I am of opinion that this motion should be granted, and with costs.

KENNY, J.:—

I concur in thinking that the applicant is entitled to have this judgment set aside. I am satisfied that it is one entered up as the result of collusion between the plaintiff and defendant, who are husband and wife, with the object of creating a judgment debt against the husband in his representative capacity as administrator of Eliza Mehaffey, deceased, in respect of a sham debt, with the object of sweeping away a considerable part of the assets of the deceased which would otherwise be distributable amongst the next-of-kin, of whom the applicant is one. The alleged debt is a curious one. The plaintiff was daughter-in-law of the deceased woman, who seems to have lived in a very small house down to the time of her death. The plaintiff was married to the defendant in the year 1892, and her case is that immediately after her marriage she advanced money to the deceased to the extent of £78 6*s.* for the purpose of building a new house. A new house was built, but the parties never resided in it during the lifetime of the deceased. The latter resided in the old house with the plaintiff and defendant. The alleged debt having been contracted in the year 1892, no step was ever taken for its recovery, and it is not heard of until long after the death of the mother-in-law. She died in December, 1899, aged 92, having made a will by which she left her little

(1) L. R. 10 Ch. App. 373.

property to the plaintiff and defendant for their lives. The defendant took out administration in November, 1900. And in January, 1904, at a time when this alleged debt had been long since barred, the plaintiff commenced an action against her husband to recover the debt of 1892. He allowed judgment to go by default on the 28th January, 1904, and in ten days afterwards, namely, on the 8th February, executed a mortgage of the farm to the plaintiff to further secure the judgment debt. The whole transaction seems to me to be saturated with fraud and collusion, and could not, in my opinion, be supported if impeached in a Court of Equity.

But assuming that to be so, the plaintiff contends that the applicant, as one of the next-of-kin, has no *locus standi* in this action, and cannot be joined as a party to it, or allowed to intervene. I agree that in the ordinary case of an action by a creditor against a personal representative for recovery of a debt due by the deceased, the personal representative is the only person who should be defendant. It would be improper in such a case to join a next-of-kin as such. But I think the present is a different and a very exceptional case; and if we think that the rights of the applicant may be prejudicially affected by this judgment standing, I think we should allow him to intervene. In my opinion, he may be so affected. The plaintiff can issue execution on the judgment at any moment, and seize and sell the goods of the deceased. The time for distribution of the assets amongst the next-of-kin will not arrive until the deaths of the plaintiff and defendant, and, in the meantime, the assets may vanish under colour of legal process. In these circumstances we should not, unless compelled to do so, put the applicant to the expense and delay of an equity suit to have the judgment and mortgage declared to be fraudulent, and for a consequent order for the execution of a satisfaction piece. Order XVI., Rule 11, enables the Court to add parties at any stage of the proceedings; and Order XXVII., Rule 16, gives authority in the most general terms to the Court to set aside a judgment. In *Jacques* v. *Harrison* (1) it was held that an equitable mortgagee might be let in to defend an ejectment, and for that purpose a

(1) 12 Q. B. D. 165.

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judgment obtained against the mortgagor was set aside. In that case, a judgment by default in ejectment had been obtained against a lessee founded on an alleged forfeiture. The defendant's interest had been equitably mortgaged, and the Court, at the instance of the equitable mortgagee, set aside the judgment on the ground that the equitable mortgagee had an interest, and the defendant had substantially none, and that the General Order was sufficiently wide to enable the Court to remove what was a blot on the mortgagee's title.

It seems to me that the applicant here, though having no original *locus standi* which would entitle him to be made a co-defendant with the personal representative, has such a direct interest in the assets of the deceased as to justify him in asking us to set aside a proceeding which seriously prejudices his rights. The judgment is the foundation of the mortgage, and, apart from the manifest danger of the assets being lost to the next-of-kin through the operation of a *fi. fa.*, the mortgage is a blot on the title to the reversion in the assets which would operate injuriously if the applicant wanted to sell or mortgage his share. I, therefore, concur in thinking that this judgment should be set aside, and that the applicant should be at liberty to intervene and defend the action in the name of the defendant on giving him a proper indemnity. The plaintiff must pay the costs of the application.

Solicitors for the applicant: *Fisher and Fisher.*
Solicitor for the plaintiff: *S. Cunningham.*

R. ST. J. C.

THE KING (QUINNELL) *v.* THE COUNTY COUNCIL OF KERRY (1).

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*Local government—County Council—Proposal committee—Lowest tender—Resolution—Contract—*Certiorari*—Mandamus—Procedure of Councils (Privy Council) Order*, 1899, *Articles* 16, 33—*Local Government (Ireland) Act*, 1902 (2 *Edw.* 7, *c.* 38), *s.* 18 (1), (2), (3), (5).

The proposal committee of the County Council of K. accepted the tender of R. & Q. for printing and office requisites. Among the other tenders received there were two which were lower than the tender accepted, and the minute made in obedience to the Local Government (Ireland) Act, 1902, sect. 18 (1), stated that their reasons for not accepting the lower tenders were that R. & Q. had fought a combination amongst local newspaper proprietors and printers so successfully that the cost of printing and advertising had been reduced throughout the county, and so long as R. & Q. continued to tender at reasonable prices they considered it the duty of public bodies to give them the preference, and furthermore, their work in previous years had been most satisfactory:—

Held, by Palles, C.B., that the resolution adopting the tender was not within the definition of acts judicial, viz. acts done in exercise, or assumed exercise, of jurisdiction by competent authority, and imposing liability *per se*, or affecting the rights of others, and, whether taken by itself or in connection with the contract subsequently entered into, the resolution could not be brought up on *certiorari*.

Held, by Andrews and Johnson, JJ., that, under the circumstances of the case, where there was an existing contract, which the Court was not in a position to interfere with, and where the applicant was not entitled, as of right, to the writ, *certiorari* should not be granted.

Held, also, that where such a contract, being one that the County Council had power to enter into, is impeached upon the ground that it was entered into *mala fide*, it is a contract voidable only and not void, and the Court would not, while it remains a subsisting contract, issue a mandamus to enter continuances and consider the tenders according to law.

APPLICATION for *certiorari* and mandamus. The prosecutor was a partner in the firm of John Quinnell & Sons, Tralee, printers. In answer to an advertisement from the County Council of Kerry, Quinnell & Sons, on July 26, 1904, tendered for the

(1) Before PALLES, C.B., and ANDREWS and JOHNSON, JJ.

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printing work and office requisites of the Council for the period from September 30, 1904, to September 30, 1905, at the price of £323. The tender was correct in every respect, and fulfilled all the conditions required by the advertisement. The proposal committee of the County Council met at Tralee on July 27, 1904, for the purpose of considering *inter alia* the tenders for the printing work and office requisites. The following tenders for the work were submitted to the proposal committee:—George Raymond, £397; Ryle & Quirke, £390; George M'Kern & Sons, Limited, £325; and John Quinnell & Sons, £323. The proposal committee accepted the tender of Ryle & Quirke, although their tender was £67 higher than the tender of Quinnell & Sons, and £65 higher than that of M'Kern & Sons, Limited. In compliance with the Local Government (Ireland) Act, 1902, sect. 18 (1), which provides that when the Council or proposal committee accepts a tender which is not the lowest tender, a minute shall be made stating the reason for the non-acceptance of the tender or tenders which are lower, the form of minute prescribed was filled up as follows:—

KERRY COUNTY COUNCIL.

Form of Minute prescribed by the Order, in pursuance of section 18 (1) *of the Local Government (Ireland) Act*, 1902.

Tenders for the undermentioned Public Work were received, as follows:—

No of Tender in order of being opened.	Nature of Public Work tendered for.	Name and address of each person tendering for public work.	Price or prices named in each Tender received.
1	Printing and Office Requisites for the County Council, for year ending 30th Sept., 1905. £550.	John Quinnell & Sons, Printers, Tralee,	£323
2		M. P. Ryle & Thos. Quirke, Tralee,	390
3		Geo. M'Kern & Sons, Limited, 113, George-st., Limerick,	325
4		George Raymond, Square, Tralee,	397

On the motion of Mr. T. T. O'Connor, seconded by Mr. M. J. Nolan, it was resolved unanimously to accept the tender of Messrs. M. P. Ryle and Thomas Quirke (numbered 2 in the above Table).

The reasons for the non-acceptance of the under-mentioned Tenders were as follows:—

No. of Tender, as stated above.	Name of Person tendering.	Reasons for the non-acceptance of each Tender lower than the above-mentioned accepted Tender.
1 3	John Quinnell & Sons. Geo. M'Kern & Sons, Limited.	In case it is decided, under section 18 of the Local Government Act, 1902, that this is a public work, we give the following reasons:— In accepting the tender of Messrs. Ryle & Quirke we are acting in the best interests of the ratepayers by encouraging genuine competition. It is a notorious fact that before the advent of these contractors a combination existed between local newspaper proprietors and printers, which prevented any competition at all. Messrs. Ryle & Quirke have fought that combination so successfully that the cost of printing and advertising has been reduced throughout the county within the past couple of years by nearly 50 per cent. Their prices have been most reasonable, and so long as they continue to tender at reasonable prices we consider it is the duty of public boards to give them preference. Further, these contracts during the past two years have given the Council and its officers more satisfaction than did any of the previous contractors. The dispatch with which they executed the work enabled our secretary to dispense with the services of a big temporary staff much sooner than he otherwise could do, thus effecting a saving to the Council and to the ratepayers. We further note, that in the case of the Limerick County Council the accepting of Mr. Quinnell's "lowest tender" has led to endless friction and litigation, and that, in a case at the suit of Mr. Quinnell against the Limerick County Council, heard before Judge Adams, Mr. Quinnell asked to be relieved of his contract.

P. M. QUINLAN, *County Secretary.*

The prosecutor alleged that the reasons which actuated the proposal committee were not the reasons set forth in this minute, which, he said, was prepared prior to any decision on the printing contract. The tenders of Quinnell & Sons and M'Kern & Sons,

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Limited, were not, he alleged, considered at all by the committee, who were determined in any event to accept the tender of Ryle & Quirke. In the year 1903, Ryle & Quirke were also declared contractors for the printing works of the Council, at the sum of £475, Quinnell & Sons having tendered at the sum of £425, and M'Kern & Sons, Limited, at £470. He alleged that Ryle & Quirke were being subsidised by the County Council at the expense of the ratepayers.

The allegations of *mala fides* against the County Council were denied by their secretary, who stated that all tenders were considered, and that the reasons for not accepting the lower tenders stated in the minute were the true reasons of the Council. Large reductions, not only in the cost of printing done for the County Council, but in that of the Rural District Councils and Boards of Guardians in the county, had been effected by reason of the competition introduced by Ryle & Quirke. The competition had also reduced the cost of advertising. As regards M'Kern & Sons' tender for the printing of the current year, it was not in accordance with the advertisement, and did not include the supply of office requisites, which was a substantial item. Michael J. Nolan, Vice-chairman of the Council, made a statement to the same effect.

The prosecutor obtained a conditional order for a writ of *certiorari*, directed to the County Council, to quash the resolution of the proposal committee, accepting the tender of Ryle & Quirke, and for a mandamus, commanding the County Council, according to their duty and authority in the premises, to enter continuances upon, and proceed to re-hear and to hear and consider, according to law, the tender sent in by John Quinnell & Sons, upon the ground (as to the *certiorari*) that the resolution was made without, and in excess of, jurisdiction, and that it was not warranted or authorised by the Local Government (Ireland) Act, 1898, or by the Procedure of Councils (Privy Council) Order of January 30, 1899, or otherwise by law.

The case was argued upon motion to make absolute the conditional order, notwithstanding cause shown.

Healy, K.C., and *M'Elligott*, for the prosecutor.

R. Barry, K.C., and *Bernard Roche*, for the County Council.

The arguments fully appear from the judgment.

The following cases were referred to:—*The Queen* (*O'Sullivan*) v. *The District Council of Mallow* (1); *The Queen* (*Wexford County Council*) v. *The Local Government Board* (2); *In re Presentments County Mayo* (3); *Kelly* v. *The Queen* (4); *Ashbury Railway Carriage and Iron Company* v. *Riche* (5); *Baroness Wenlock* v. *The River Dee Company* (6).

PALLES, C.B.:—

Dec. 15.

This is an application for a *certiorari* to quash a resolution of the County Council of Kerry, accepting a tender for printing, and for a mandamus to proceed to consider all the tenders sent in for that work. Mr. Barry, for the defendants, has insisted that such a resolution is not a subject for *certiorari*, and, whether it is so or not, is the first question for determination.

It is a case of first impression, but the principles applicable to it are settled and certain; and from their application to the present case, I entertain a strong opinion that the resolution before us is not a judicial determination capable of being brought up on *certiorari*. As to the cases, which are many, in which presentments of Grand Juries were so brought up, it is sufficient to say that such presentments were of no validity until fiated by the Judge of Assize, and when so fiated became orders or presentments of the Court of Assize, and (subject to a doubt, of which I could never rid myself, but which, in consequence of prior decisions which bound me, I was unable to give effect to) incident to the nature of the Court of Assize being a Principal Superior Court of Record (7), they were plainly fit subjects to be examined under this writ.

As to the nature of a judicial act capable of being reviewed under this jurisdiction, the judgment which, in recent years, is, to my mind, the most authoritative, is that of May, C.J., in *The Queen* v. *The Corporation of Dublin* (8). He there says:—"It is established that the writ of *certiorari* does not lie to remove an order merely ministerial, such as a warrant, but it lies to remove

(1) [1901] 2 I. R. 355.
(2) [1902] 2 I. R. 349.
(3) 14 Ir. C. L. R. 392.
(4) [1898] 2 I. R. 719.
(5) L. R. 7 H. L. 653.
(6) 10 A. C. 354. [N. S. 3.
(7) See *Ex p. Fernandez*, 10 C. B.,
(8) 2 L. R. Ir. 371, at p. 376.

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and adjudicate upon the validity of acts judicial. In this connection the term 'judicial' does not necessarily mean acts of a Judge, or legal tribunal sitting for the determination of matters of law; but for the purpose of this question, a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others."

The question was much considered both in the Queen's Bench Division and in the Court of Appeal in *The Queen (Wexford County Council)* v. *The Local Government Board* (1). There Lord O'Brien, L.C.J., in the Queen's Bench Division, approved and adopted the principle which had been laid down by Chief Justice May. In the same case, in the Court of Appeal, FitzGibbon, L.J., at p. 383, after referring to Chief Justice May's judgment and also to the well-known judgment of the late Lord Esher in *The Queen* v. *The Local Government Board* (2), proceeds as follows:—"These statements have been criticised, but, as applied to the cases under consideration, I respectfully venture to say that they appear to me to be right. They were made in cases where the acts considered were done in the exercise, or assumed exercise, of *jurisdiction*, as distinguished from any other authority. Ministerial and administrative acts may be done by Courts as well as by others; they may involve consideration of facts and circumstances; they may impose liability and may affect rights; and yet such acts may not be controllable by *certiorari*. Therefore, the statements which I have quoted must be confined to acts involving the exercise, or assumed exercise, of some jurisdiction. . . . In seeking it [this jurisdiction], before I apply the law laid down by Lord Esher and May, C.J., I am neither correcting nor qualifying the language of those eminent Judges, but only ascertaining that their words apply to this case." It will be found, on considering the other judgments in the case, to which I do not refer, as I myself was one of the Judges, that each of the other members of the Court, subject in the case of Lord Justice FitzGibbon to that criticism, distinctly approves and adopts that judgment of Chief Justice May. I do so in terms. Lord Justice Walker adopts, in its entirety, my judgment, which he had read. Lord Justice Holmes agrees with my judgment so far as it relates to *certiorari*.

(1) [1902] 2 I. R. 349. (2) 10 Q. B. D. 309, at p. 321.

The subject-matters before the Lord Chief Justice were acts judicial and ministerial. The question before him was to distinguish between these two classes; there, therefore, was a well understood basis underlying the subject-matter that the act in controversy was one done in the exercise, or assumed exercise, of jurisdiction. The judgment of Chief Justice May, approved and adopted as it has been by the Court of Appeal, I conceive to be now the settled law in this country.

Now, does the resolution here come within the description given by May, C.J.? I confess that I was surprised to hear it argued that it did. If the words of the judgment had been taken by the learned counsel in connection with the observations of Fitz Gibbon, L.J., in reference to them, I hardly think that the argument could have been persevered in. Plainly, it did not impose any penalty *per se*. Nor did it *per se* "affect any right of others." It is no more than a step towards something else, that is to say, to a contract. Let it rest as it is, without being followed by a contract, *nil operatur*.

Now I proceed to take it, not *per se*, but in connection with the contract which it contemplated. The contract of course does impose a liability and does affect rights, the liability and the rights of the contracting parties, and those whom they, either as agents or trustees, are competent to bind. But such rights are not of the class which were in the Chief Justice's contemplation. Not only the context, but his words exclude them. I have already said that the subjects that he had under consideration were acts judicial and ministerial. The distinction which he so well draws between these two classes and the nature of the rights which it is the characteristic of a judicial act to be capable of affecting, is rightly described by him as "the rights of others." Of course, one's own rights, or the rights of those whom he represents, may be affected by his own acts, but such acts are not judicial. The effect of a contract in imposing liability or affecting rights is essentially different from the operation in that respect of judicial determination. A contract operates by consent. The essence of judicial action, although in some cases it may be founded on consent, is that it may be—indeed, usually is—adverse and coercive upon every person bound by it. In result, then, whether the

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resolution is taken merely *per se* or in connection with the contract of the 30th August made thereunder, it cannot be brought up under this writ. I should not have said so much upon the subject if I did not feel the necessity (a necessity which I think other Judges have already expressed), in these early days of the operation of our Local Government Act, of laying down (subject of course to correction upon appeal) in words that cannot be misinterpreted the true limits of our prerogative jurisdiction over the newly created local bodies, so that the foundation for the superstructure, which the decisions of this Court are building, may be sure and solid.

But whilst I thus, as far as in me lies, exclude from the jurisdiction of this Court in *certiorari* the matter before us, I may be permitted to say that I cordially endorse the observations of Gibson, J., in *Reg.* (*O'Sullivan*) v. *Rural District Council of Mallow* (1), in which he says:—"The Court is not to be understood as laying down that where a Rural District Council rejects tenders in pursuance of a declared policy . . . without any *bona fide* consideration, mandamus may not be available as a remedy. Paper reasons might always be put forward to screen the true motive of the rejection; but the jurisdiction of the Court where it exists cannot be evaded by forms." Had the prosecutor's case before the Court there been made out, in my opinion, mandamus would have lain, because the employment there of direct labour was not one the continuance of which would have been in any way compulsory on the District Council.

On the question of mandamus, the present case differs from the *Mallow Case* (1) in this, that here there is a contract which, if not void, is a continuing one, at the present moment binding upon the County Council. I am clearly of opinion that were we deciding this case before the Local Government Act, 1902, if we were of opinion that the contract had been executed for motives which are fraudulent in the eyes of this Court, we would have been obliged to hold that such contract was voidable merely, and not void. Mr. M'Elligott, in the course of his

(1) [1901] 2 I. R. 355.

able argument, rightly referred us to *Ashbury Railway Carriage and Iron Company* v. *Riche* (1), where it was held that a contract by a Company incorporated under the Companies Act, 1862, which went beyond the memorandum of association, was void and not voidable, and that is plainly settled law. But there the contract was one which the Company had no power to enter into. Here the County Council have power to enter into a contract of this description, and the impeachment of it is on the ground that, although within jurisdiction, it was entered into for an object which the law considers fraudulent. I do not, however, intend to elaborate this point, which would arise only upon the assumption that the statute of 1902 had not been passed, because, looking at section 18 of that Act, it is plain that even if such a contract would before the Act have been wholly void, the effect of the Act is to make such contracts after the Act voidable only. Section 18 (3) provides:— "If, at any such audit, it appears to the auditor that any tender was accepted or approved of for any fraudulent or improper purpose or object, or for any purpose or object other than the *bona fide* discharge by the persons who accepted it of their duties in the interests of the ratepayers, he may declare any contract entered into in accordance with the tender to be illegal, and the contract shall *thereupon become void.*" Words could not more clearly say that the contract was not void in its inception? Sub-section 5 makes it even still clearer: "Where a contract is declared to be illegal in pursuance of this section, the contractor may, notwithstanding such declaration, recover any sum due to him for work or materials supplied *before such declaration*," that is, before it was declared void.

In my opinion, before the Act of 1902, the only remedy in a case of this description, had the alleged purpose been established, would have been in equity, and not by mandamus, and for this reason, that the Court, upon mandamus, cannot make a declaration which renders void that which, at the moment previous to such declaration, was voidable only. The Court may, in certain well-known cases, as where a tribunal is affected by an improper motive or *bias*, such as that suggested here, make

(1) L. R. 7 H. L. 653.

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such a declaration upon *certiorari*. But the nature of the jurisdiction in mandamus is wholly different. *Certiorari* is to remove void adjudications, and, as ancillary to that, in certain cases to declare void that which is contrary to natural justice. But mandamus cannot *make* void. Its function is to have that done which ought to have been done, but which has not been done. The operation of *certiorari* is destruction. That of mandamus, on the contrary, is insistence upon action. If an act of the Court is necessary to avoid a voidable act, mandamus cannot be the proper remedy, where that act could not have been done before the writ. This, I believe, was the ground upon which, before the statute of 1902, the proceedings taken by the law officers of the Crown against certain councils for corruptly entering into contracts were in the Chancery Division, and not by prerogative writ.

For these reasons, I am of opinion that this application wholly fails.

ANDREWS, J.:—

I concur in the conclusion arrived at by the Lord Chief Baron. I do not express any dissent from his judgment on the question whether the resolution of the County Council can be made the subject of *certiorari*, but this was not as fully argued as I would have wished it to have been in a case of the first impression, and I prefer to rest my judgment on the grounds that there is an existing contract, which the Court is not in a position to interfere with, on the present application, and this is not a case in which the applicant is entitled to a writ of *certiorari* as of right. Recent legislation has made provision under which the matter can be brought before the auditor, but in saying so, I wish to abstain from offering any opinion on the merits of the transaction, so that if it should come before the auditor, it may do so unaffected by any opinion expressed from the Bench.

JOHNSON, J.:—

I entirely agree in the view taken by my brother Andrews of this case. I do not dissent from the Lord Chief Baron, but I

prefer to rest my opinion on the ground which my brother Andrews has mentioned.

I observe in the conditional order that one of the reliefs sought to be obtained was to require the County Council to enter continuances and hear the case. I do not see how that course is at all applicable to such a case as the present.

Solicitor for the prosecutor: *J. M. Murphy.*
Solicitor for the County Council: *F. H. Downing.*

J. L.

THE KING (BURKE) *v.* JUSTICES OF CO. CORK (1).

Justices—Conviction—Entry in order book—Power of Justices to amend subsequently.

B., a publican, was charged on summons before three magistrates at Petty Sessions with having supplied intoxicating liquor to a drunken person. The case was heard on the 26th February, 1904, and B. was convicted, the order then made, as appearing from the entry book, being—"Defendant convicted, and fined 40*s.*, and costs, 1*s.*, to be recorded on his license. In default of payment one month's imprisonment in C. gaol." Subsequently, on the 17th June, two of the magistrates who had adjudicated, with the concurrence of the third, who was not then present, amended the order in the order book by adding the words "without hard labour" and "unless said sums be sooner paid." The conviction in its original form was admittedly bad:—

Held, that, under the circumstances, there was no jurisdiction to amend the conviction.

Held, by Lord O'Brien, L.C.J., and *semble*, by Gibson, J., that after the magistrates adjudicating at Petty Sessions have separated they have no power to amend an order made by them and duly entered in the order book.

Held, by Gibson and Madden, JJ., that, even assuming the magistrates had such power (as to which Madden, J., expressed no opinion), it could only be exercised by all the magistrates who originally adjudicated reassembling, and making the amendment as a judicial act.

CERTIORARI.

The prosecutor, a licensed publican, was charged on summons

(1) Before LORD O'BRIEN, L.C.J., and GIBSON and MADDEN, JJ.

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with unlawfully selling intoxicating liquor to a person who was then drunk. The case came on for hearing at Dunmanway Petty Sessions on the 26th February, 1904, and the prosecutor was convicted by the Justices then sitting, Messrs. Purdon, R.M., and Beamish and Lucas. An order was made, and duly entered in the order book, to the following effect:—"Defendant convicted, and fined the sum of 40*s*., and costs, 1*s*., for selling intoxicating liquor to one Patrick Driscoll, said Patrick Driscoll being drunk, to be recorded on his license. In default of payment, one month's imprisonment in Cork County Gaol." The prosecutor appealed to Quarter Sessions against the order, but the appeal was struck out, on the ground that Form H. had not been lodged.

On the 17th June, 1904, Messrs. Purdon and Beamish, two of the magistrates who made the order of the 26th February, purported to amend, in the order book, the said order, by adding the words "without hard labour," and the words "unless the said sums be sooner paid." In an affidavit made by Mr. Purdon it was stated that the amendment was, with the concurrence of Mr. Lucas, duly made and initialled by Mr. Beamish and deponent in open Court, at Petty Sessions held at Dunmanway on the 17th June, 1904.

The prosecutor obtained a conditional order for a writ of *certiorari*, to remove, for the purpose of being quashed, the original order and the order purporting to amend it. Cause having been shown, the present application was, on behalf of the prosecutor, to make the conditional order absolute.

George Green, for the prosecutor:—

The original conviction of the 26th February, as entered in the order book, was bad, as it did not, after imposing one month's imprisonment in default of payment, go on to add—"unless the penalty be sooner paid": *R.* (*M'Erlean*) v. *Justices of Antrim* (1). It was also bad because it did not add—"without hard labour." There was no power to amend the order after the Court had broken up: *Smith* v. *M'Glone* (2).

(1) 2 New Ir. Jur. Rep. 256. (2) 8 L. R. Ir. 267.

The Solicitor-General (*Campbell, K.C.*), and *Cecil Atkinson*, for the Crown :—

We admit that the original order was bad as it originally stood; but we submit there was power to make the amendment. The law is stated in Paley on Summary Convictions (8th edition, p. 319) to be that the formal conviction may be drawn up at any time before it is acted upon, or before the return of the *certiorari*, although after a commitment, or after the penalty has been levied by distress, or after action brought against the magistrate. The proposition there laid down goes far beyond what is necessary to be maintained in the present case. This statement of the law in Paley depends on the common law, and does not depend upon any power of amendment given in England by 11 & 12 Vict. c. 43, since the cases on which it is founded were decided before that statute. The cases establish that, independently of statute, magistrates have power to amend a conviction, subject to two conditions only, both of which are fulfilled here, viz. that the amendment must be as to a matter of form, and must be justified by the facts: *R.* v. *Richards* (1); *Chaney* v. *Payne* (2); *Selwood* v. *Mount* (3); *Ex parte Kenyon* (4); *R.* v. *Barker* (5); *R.* v. *Allen* (6); *Charter* v. *Greame* (7); 1 Smith's L. C., 10th ed., p. 646. There is nothing in the Petty Sessions (Ireland) Act preventing an amendment being made in the order. [GIBSON, J., referred to *Ex parte Austin* (8).]

Green, in reply :—

The English cases cited have no application in this country. In England the entry by the magistrates is merely a note or memorandum, from which the formal order is afterwards drawn up. In this country the effect of section 21 of the Petty Sessions (Ireland) Act, 1851, is, that the entry in the order book is the conviction, and there is no question of drawing it up afterwards in a more formal manner.

Cur. adv. vult.

(1) 5 Q. B. 926.
(2) 1 Q. B. 712, at pp. 722, 723.
(3) 9 C. & P. 75.
(4) 45 J. P. 303.
(5) 1 East, 185.
(6) 15 East, 333.
(7) 13 Q. B. 216.
(8) 50 L. J. (M. C.) 8.

K. B. Div. 1904.

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Nov. 3.

LORD O'BRIEN, L.C.J.:—

This is a very important case, perhaps one of the most important argued in this Court since I have sat in it. The question is as to what power of amendment magistrates have under the particular circumstances. Whether, when they have made an order at Petty Sessions which is duly entered in the order book, and signed pursuant to the statute, and the Court has broken up, and the magistrates have separated and possibly have been subjected to sinister influences, they have jurisdiction to come back and amend the order. The mere statement of the question shows its great importance. What are the facts? A publican named Burke was summoned for supplying intoxicating liquor to a man named Driscoll who was at the time intoxicated. The case came on for hearing on the 26th February, 1904, before three magistrates, and an order was made by them and duly entered in the order book to the following effect:—"Defendant fined 40*s.* and 1*s.* costs, or in default one month's imprisonment, the said conviction to be endorsed on the license." That was a bad order; so defective that it could have been quashed on *certiorari*, as appears by the case of *R.* (*M'Erlean*) v. *Justices of Antrim* (1), cited by Mr. Green. Some months afterwards, on the 17th June, 1904, after the Court had broken up, and the magistrates had separated, two of the magistrates who had adjudicated came back, and, purporting to act with the authority of the third, amended the order by adding the words "without hard labour," and "unless the said sum be sooner paid." That is to say, on the 17th June, they make what, on its face, purports to be a good order, of the bad order made in February. Had the magistrates any authority to alter the original order after the Court had broken up, and the magistrates had separated and gone out amongst the public? This question, in my judgment, is of the greatest importance, and it is one upon which I entertain no doubt. A number of English cases have been cited to us; but, in my opinion, they have no bearing on the point, since the question in this country must turn on the construction of the Petty Sessions (Ireland) Act, 1851, 14 & 15 Vict. c. 93, which forms a code complete and exhaustive in itself

(1) 2 New Ir. Jur. Rep. 256.

regulating the procedure before magistrates at Petty Sessions. Section 21 of that Act provides that when an order is made "one of the Justices then present shall thereupon enter, or cause the clerk to enter, the particulars of such case, and the substance of the decision thereon, in a book to be kept for that purpose, to be called the 'Order Book,' according to the Form (D) . . . , and such entry, when one of the Justices shall have signed his name opposite to it, or after it (which one of the said Justices is hereby required to do), shall be deemed to all intents and purposes a conviction or order, as the case may be." In the present case the order originally made by the magistrates purported to be so entered and signed, and then, after the Court had broken up, an alteration in a matter of substance of a vital character was subsequently made. I am of opinion that on the true construction of sect. 21 the magistrates, after the Court had broken up, had no power to touch the order in any way, or to make any alteration whether in a formal matter or otherwise. In my judgment it is a very nice question indeed as to what is a formal matter and what is not, but I am of opinion that the magistrates had, under the circumstances, no right to touch the order at all. Under the Petty Sessions Act a power of appeal to the Quarter Sessions is given in certain cases. Suppose, after the Court is broken up, an appeal is taken from a bad order, would the magistrates below have power to amend it so as to cure the defect?

It is admitted by the Solicitor-General that no example can be found since the passing of the Petty Sessions Act, 1851, of any amendment of this kind ever having been made by the magistrate. If the power claimed existed, it is very strange that the many able men who have had to deal with orders made at Petty Sessions never discovered or suggested this power of amendment. Indeed, I find (1) that on the 6th February, 1878, an order was issued by the Duke of Marlborough, the Lord Lieutenant of the day, to the magistrates, stating that His Grace was advised that each order should be signed in the order book by a Justice signing his name opposite to it, or immediately after it; that a signature by initials was not sufficient; that all the terms of the order should be

(1) See Breakey's Magistrate's Handbook, p. 572.

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entered in the book before the signature was attached; and that afterwards no alteration or amendment of any kind could be made. I agree in the opinion of the law officers of the time (no doubt this direction was addressed to the magistracy on their advice) to this extent, that once the Court has broken up no alteration or amendment of any kind can be made. Once the magistrates who constituted the Court separated, the Court which they constituted, and which had jurisdiction, ceased to exist. It is not suggested there was an adjournment.

There is more in the case, because the order having been made by three magistrates, the amendment was made by two only, who allege that they have the consent of the third who was not in Court when the amendment was made, and it is argued that if the amendment can be made at all it must be made by all three. I desire, however, to rest my judgment on the first ground I have mentioned, viz. that the order entered in the order book and signed by the magistrates is sacred, and cannot be touched after the Court has broken up, and the magistrates have separated.

GIBSON, J.:—

The conviction in this case is sought to be quashed on two grounds—(1) there was no jurisdiction to amend the original entry of the conviction in the order book, which, in its original form, was admittedly bad; (2) all the members of the original Court should have been present and concurred in the alteration.

1. Counsel for the prosecution rely on the English practice, and cases in Paley and Stone, which show that a conviction drawn up after the decision in Court may be (subject to certain limitations) amended or withdrawn, and a new valid conviction substituted in accordance with the facts proved. A minute was entered of the decision at the time, but the record was the formal document subsequently drawn up and signed. This power of amendment and substitution did not extend to orders: *R.* v. *Cheshire Justices* (1); Nun and Walsh (ed. 1841), p. 644. The law in Ireland was probably the same previous to the Petty Sessions Act, and is so stated in Nun and Walsh. The question

(1) 5 B. & Ad. 439.

now raised is whether since that statute such amendment is possible. Counsel for the Crown informs us that no decision on the subject exists, and that there is no reported example of amendment or substitution. They contend, however, that the old principle still applies, that a manifest mistake in a conviction can be corrected, and that if this could be done in England even after the conviction was lodged with the Clerk of the Peace (*Charter* v. *Greame* (1)), the record in the Petty Sessions order book can similarly be set right as to matters of form. The only thing like authority in support of the Crown contention is as follows:—Mr. Molloy, following Levinge, appears to treat the English practice as to drawing up a conviction as a substantive document, separate from and after the entry in the book, as applicable to Ireland (Molloy's Justice of the Peace, p. 222); and in the arguments of counsel in some cases (e.g. *Reg.* v. *Dublin Justices* (2)) the applicability of the English practice has been assumed without question. On the other hand, the arguments adverse to the power to amend are weighty. The practice has been against it. *Certiorari* has been allowed in many cases for technical omissions which could easily have been supplied if there was a power of amendment.

Section 21 of the Petty Sessions Act prescribes that the entry in the book is to be deemed to all intents and purposes a conviction or order, as the case may be. It is signed by the Justice; it is the official record; and if the statutory directions are complied with, that is usually sufficient without the minute particularity necessary to support a conviction formerly: *Reg.* v. *Hamilton* (3). The entry cannot be regarded as a mere minute. A conviction and order are put on the same footing, and the latter could not have been amended. Section 24 prescribes the time and conditions of appeals. Form H represents the recorded order. It is this order and nothing else that is before the Quarter Sessions. No conviction extrinsic to the order book is contemplated. If the order-book can be amended, is there any limit of time for so doing? How is the order to be dated? What is the effect of the amendment as to the time for appealing under section 24, and as

(1) 13 Q. B. 216. (2) 18 L. R. Ir. at p. 112. (3) 6 Ir. Jur. (N. S.) at p. 158.

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to form H? Could an amendment be made pending an appeal? After the order book is signed and the Court breaks up the judicial function as to the cases disposed of is at end. Justices are not like a Superior Court, which has continuous existence. Such latter Court may amend its orders where there has been a clerical mistake or slip; but even in such case, there is usually a statute or General Order authorising the alteration. After an order is passed and entered on the Court records, it is never changed without notice to the party affected. The alteration of an order is a judicial act. After a Petty Sessions Court rises, as to all unadjourned business it ceases to exist as a Court and the members by reassembling on a future day cannot claim to be in the same position as if they were a continuous Court, and were still seized of the original case. All the above considerations, as well as the clear policy of the statute which, for obvious reasons, requires the columns of the order book to be filled accurately at the time as the official record, appear to exclude the application of the practice in England before and under Jervis' Act, where the book contains only a minute, and the formal record is afterwards drawn up and signed. My present opinion would be adverse therefore to the existence of the suggested power of rectification.

2. If the power existed, clearly it should be exercised by the same Court as pronounced the original conviction. The Justices should sit together as a Court and consider the question together judicially. Here only two of the original Justices sat. They allege the third Justice concurred; but such concurrence was given orally out of Court. A record cannot be altered, save by the Court which made the order. In *Reg.* v. *Cork Justices* (1) it was held that where there was an adjournment of a case merely for the purpose of pronouncing the order, all the Justices who heard the case must be present in Court. This is a strong case, and if good law applies *a fortiori* to a subsequent rectification of the record made by Justices meeting without any adjournment. It would be most dangerous if the order book could be varied by a Justice on authority given by absent colleagues; the validity of his act would depend on a fact which could not be recorded, the existence

(1) 18 L. R. Ir. 99.

of such authority. For every judicial act the Justices must attend in person, and what they decide represents the result of their joint personal consideration. A Justice cannot delegate to another the right to represent him, or decide outside Court what should be done by the Justices at Petty Sessions in Court.

MADDEN, J.:—

I express no opinion upon either of two questions of general importance which have been discussed in this case. It is not, in my opinion, necessary to decide whether the power of reassembling to correct a formal error, which Justices possessed before the passing of the Petty Sessions Act, still exists. Nor is it necessary to consider whether the alterations which were made in the present case were the rectification of a merely formal error. Assuming the jurisdiction to exist, it is essential that the Justices should reassemble so that the Court by which the original order was made should be reconstituted. Here one of the magistrates gave what might be described as an informal proxy on which the others acted. The alteration of the order was a judicial act, which should be done by the Court as a whole. On the ground that the Court did not reassemble and act as a whole in correcting the original order, I concur in the judgment of the Court.

Solicitor for the prosecutor: *J. H. Powell.*
Solicitor for the Crown: *Sir P. Coll.*

J. G. T.

Appeal. 1904.

Nov. 3.
Dec. 1.

THE KING (M'SWIGGAN) *v.* JUSTICES OF COUNTY LONDONDERRY (1).

Justices—Jurisdiction—Certiorari—14 & 15 *Vict. c.* 92, *s.* 15—*Summary Jurisdiction Act.*

An order, made in favour of the complainant by Justices on a summons for possession, stated that the tenancy was a weekly tenancy, but omitted to state the amount of the rent. It therefore failed to show on its face that the Justices had jurisdiction to make it. The defendant was put out of possession on a warrant issued under the order. The defendant subsequently applied for a conditional order for a writ of *certiorari* to quash the order :—

Held, by the Court of Appeal (affirming the decision of the King's Bench Division), that the conditional order should not be granted; that the granting of a writ of *certiorari* at the instance of a private person is a matter of discretion, and not *ex debito justitiae*; that, as the order had been executed and the writ of *certiorari* would not restore her to possession, no benefit would be gained by the applicant from the writ, as her rights were not prejudiced by the order, seeing that it was null and void.

The writ of *certiorari* is the apt means for preventing the infliction or continuance of any wrong by any unwarranted assumption of jurisdiction.

Appeal from an order, dated 28th October, 1904, made by the King's Bench Division, refusing a conditional order for a writ of *certiorari* to quash an order of Justices at Petty Sessions.

It appeared from the affidavit made by the solicitor for the appellant that a summons was brought at the suit of one Wm. K. Houston, of Magherafelt, against Annie M'Swiggan, of Magherafelt, to recover possession of a dwelling-house alleged to be held by her as tenant to William K. Houston, from week to week, which tenancy it was alleged had been determined by notice to quit. The summons was heard on 27th July, 1904. On the hearing of the summons it was contended, on behalf of the defendant therein, that the tenancy was monthly, and required a month's

(1) Before FitzGibbon, Walker, and Holmes, L.JJ.

notice to quit, whereas it was admittedly only a week's notice that was served. Evidence was given at the hearing of the summons showing that, at the time of the original letting, the defendant was required to lodge one month's rent, 17*s.* 4*d.*, in advance: she also swore that she paid this amount monthly to the plaintiff up till 24th May, 1904. The landlord swore that the rent was 4*s.* a week, and that the letting was by the week. No receipt or rent book was produced. The Justices, by a majority of one, decided in favour of the landlord that the tenancy was weekly, and that the notice to quit was good. They made an order, which appears in the Petty Sessions Book in these terms: "Upon hearing of a complaint that the defendant on June 14, 1904, did unlawfully continue to overhold, &c., and refuse to deliver up to the complainant possession of a house and premises in Magherafelt, her weekly tenancy having been duly determined by notice to quit, defendant required to show cause why possession should not be delivered up." The magistrates granted a warrant for possession, which was executed on 5th August, 1904.

Annie M'Swiggan applied to the King's Bench Division for a conditional order for a writ of *certiorari* to quash the order made by the Justices, as it did not state all the facts necessary to show jurisdiction by reason of its omission to state that the rent did not exceed £1 a month. The King's Bench Division refused the application. From this order the present appeal was brought.

Bartley, for the appellant:—

The statute 14 & 15 Vict. c. 92, s. 15, requires two things to be proved to give the Justices jurisdiction—1, the term of the tenancy is not to exceed a month; 2, the rent is not to exceed one pound. Both these elements should appear on their order, in order to show jurisdiction: but the order omits to state the rent; therefore it is bad and should be quashed. [He cited *The Queen* v. *Campbell* (1); *Fitzpatrick* v. *Pine* (2).]

Cur. adv. vult.

(1) 3 Ir. C. L. R. 586. (2) 13 Ir. C. L. R. 32.

Appeal, 1904.

THE KING (M'SWIGGAN) v. JUSTICES OF L'DERRY.

Dec. 1.

FITZ GIBBON, L.J.:—

This is an *ex parte* appeal from an order of the King's Bench Division refusing a conditional order for *certiorari* to quash an order of Justices at Petty Sessions, purporting to have been made in a proceeding by ejectment for a house, under 14 & 15 Vict. c. 92, section 15, sub-sect. 1. At the hearing it was proved that the rent of the house was at the rate of 17*s.* 4*d.* per month; a notice to quit had been served alleging a weekly tenancy. The Justices decided that the tenancy was weekly, and held the notice to quit to be good. All this was within the jurisdiction of the Justices, and they had evidence sufficient to support their findings. Accordingly they had jurisdiction to make an order. But the order which they made does not "show jurisdiction," unless it does so in these words:—

> "Upon hearing of a complaint that the defendant, on June 14, 1904, did unlawfully continue to overhold, &c., and refuse to deliver up to the complainant, possession of a house and premises in Magherafelt, her weekly tenancy having been duly determined by notice to quit, defendant required to show cause why possession should not be delivered up."

It must be conceded that this order does not show on the face of it all the facts necessary to bring it within the jurisdiction of the Justices at Petty Sessions, because it does not state the amount of the rent. But at the hearing all the necessary facts were proved, and the Justices had the materials for stating them on the order.

The first question is—"*Must* we make an order for *certiorari*, seeing that the order of the Justices is, on its face, insufficient?" We answer—*No.*

On the principles which govern the action of the Court upon *certiorari* this Appeal is untenable.

Certiorari, in cases like the present, is granted in the exercise of discretion, and not *ex debito justitiæ*. If a right is involved, or if a wrong is continuing, or if liberty or character is at issue, or if a defective order is operating in any way, it may be otherwise. But this order is now neither operative nor obstructive. In *The Queen* v. *The Justices of Tipperary* (1), the Order did not state on

(1) 17 Ir. C. L. R. 564.

its face that the conditions precedent necessary to jurisdiction had been satisfied, and it omitted to negative certain statutory exceptions. A conditional order had been obtained, but the Queen's Bench allowed the cause shown, though without costs. In that case the same objections were made which Mr. Bartley has made here. Counsel, showing cause, argued that the Court could not go behind the conviction, but must assume that it was made on good grounds. O'Brien, J., interrupted—"Assuming that Mr. Ryan is right that the conviction is bad, he may show that this is a fit case for us to exercise our discretion." A remark of Lefroy, C.J., during the argument, shows that he treated the order as one that did not "show jurisdiction" on its face. Yet, in giving judgment, holding that the merits of the case did not require that the order should be quashed, he concluded—

> "We are therefore clear that the conditional order should be discharged; but as this Act contained an exception in the case of a house, that exception should have been negatived in the conviction, and from this *informality in the proceedings* we discharge the order without costs."

This is a clear decision that the omission to show jurisdiction on the face of an order may be treated as an "informality" justifying a penalty in costs, but that it does not, in every case, make *certiorari* imperative.

Certiorari is a writ in aid of justice, and is the apt means of preventing the infliction or continuance of wrong from any assumption or excess of jurisdiction. Here the order was made on July 27th, and executed on August 5th; the relator was put out of possession on that day, and the order was then completely sped. If it is "bad on its face," it is null and void, and it is no bar to any action. It declares no right; it affects nothing; it authorises no *continuing* wrong, and no action has been or ever can be taken upon it, since August 5th last. To bring it up to be quashed, under such circumstances, is not necessary for any purpose.

Therefore, we dismiss the appeal.

Appeal. 1904.

THE KING (M'SWIGGAN) v. JUSTICES OF L'DERRY.

WALKER, L.J. :—

The order in this case does not show on the face of it that the circumstances existed which would give jurisdiction to the Justices. But as a fact, all the circumstances necessary to give jurisdiction were proved, and the matter itself was one over which the Justices had jurisdiction, and they made the order, and the defendant was put out of possession in August, 1904. Apart from mere form, the order was right. I entirely accept the rule laid down in such cases as *R.* v. *Justices of Surrey* (1), followed in this country, *i.e.* when a right is involved. But in this case what purpose could be served by setting aside this order?

The granting of a writ of *certiorari* at the instance of a private person is not a matter of right, but of discretion. It would not in this case restore the prosecutor to possession. It would establish that form was wanting, not substance, nor anything which affected the real right. I think the decision in the case of *R.* v. *Justices of Tipperary* (2) is an express authority against the applicant. There *Fitzpatrick* v. *Pine* (3) was relied on, and the order in question was, on its face, just as informal as the one we have to deal with, yet *certiorari* was refused.

HOLMES, L.J. :—

The object of this appeal is to obtain a conditional order for a writ of *certiorari*, for the purpose of quashing an adjudication made at the Magherafelt Petty Sessions, under section 15 of the Summary Jurisdiction Act, 1851. This section gives the landlord of a house situate in a town wherein a market or fair is usually held a summary means of obtaining possession of such house if it be held for a term not exceeding a month, at a rent not exceeding £1 a month, and if the tenancy has been duly determined by a legal notice to quit.

A summons under this provision was issued by William Houston against Annie M'Swiggan to recover a house in the market town of Magherafelt, on the hearing of which it was proved that Annie M'Swiggan held the house for a term not exceeding a month, at a rent not exceeding £1. Only a week's

(1) 7 Q. B. D. 28. (2) 17 Ir. C. L. R. 566. (3) 13 Ir. C. L. R. 32.

notice to quit was given, and there was a controversy as to whether it was a monthly or a weekly tenancy; but this was determined in favour of the landlord on evidence sufficient to sustain the finding. Accordingly, an order for possession was made. It is not disputed that every other fact necessary to give jurisdiction was duly proved. Therefore, the adjudication was within the authority conferred by the Legislature upon the Court. The terms of the order, however, as appearing in the Petty Sessions Book, do not contain an averment of one of the facts proved, namely, that the rent did not exceed £1 a month.

It is sought to quash this order on the grounds that, although the Justices had jurisdiction to hear and decide the case, the facts which were the foundation of their jurisdiction are not stated in their order-book. Therefore it is argued that the order is null and void. I do not question the well-known rule that the judgment of an inferior Court must show on its face that there was jurisdiction to make it; and I shall also assume in favour of the applicant that the order under consideration fails to do so.

I also accept the proposition that a person whose rights may be affected by an illegal or invalid order of an inferior Court, or who may be otherwise prejudiced thereby, is entitled to have the order quashed, unless he is precluded by his conduct or by delay from making the application.

The High Court, however, ought not to interfere by writ of *certiorari* where its interference is manifestly unnecessary and useless, as it would be in this case.

The order was executed, and possession of the house taken early in August. The writ of *certiorari* was not applied for until nearly three months later. What benefit could Annie M'Swiggan then gain from it? It would not restore her to possession; and inasmuch as the ground of the application is that the order is invalid on its face, it could not affect her rights, whatever they may be. Courts of Justice ought not to countenance litigation that is manifestly unnecessary, and therefore I am of opinion that the appeal must be disallowed.

Solicitor for the appellant: *James Brown.*

G. Y. D.

K. B. Div. 1904.
Nov. 17, 18, 22.
Appeal. 1905.
Jan. 18.

THE KING (THOMAS POTTS) *v.* LOCAL GOVERNMENT BOARD (1).

Local government—Water supply—Sewage works—Meaning of "expenses incurred"—Area of charge—Contributory place—Public Health (Ireland) Act, 1878 (41 & 42 *Vict. c.* 5), *s.* 232—*Local Government (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 37)—*Powers of the Local Government Board.*

The expression "expenses incurred" in section 232 of the Public Health Act, 1878, means actual or estimated expenses. The powers of the Local Government Board to fix the area of charge upon which special expenses shall be chargeable are not confined to cases in which the expenses have actually been incurred, but can be exercised in relation to future estimated expenses.

By sealed order, reciting that the Rural District Council of C. had incurred, or were about to incur, special expenses, for the purpose of providing a water supply and drainage system, and maintaining same, at the town of B. in the rural district, the Local Government Board determined that the two electoral divisions of B. urban and B. rural should be the area of charge, upon which all expenses incurred, or which might be incurred, by the Council should be chargeable. The works were mainly intended to benefit the town of B., which was co-extensive with the electoral division of B. urban; but it was alleged by affidavit that benefits from the proposed works would also extend to the electoral division of B. rural, which surrounded the town of B. on every side, viz. the river, which received the sewage from the town, and which was the principal source of water supply for B. rural, would be purified; the pipe-line of the waterworks, which would run through a considerable portion of B. rural, could be tapped by the ratepayers: and it was proposed to establish a fountain at certain cross-roads for the use of the inhabitants of B. rural:—

Held, that the electoral divisions of B. urban and B. rural, being contributory places within the meaning of section 232of the Public Health Act, 1878, were places which the Local Government Board was entitled to fix as the area of charge.

Held, also (Gibson, J., *dissentiente*), that, although the sealed order did not contain any specific recital that the expenses incurred, or to be incurred, were "in, or in respect of," the contributory places mentioned, the Court should not, where there had been no transgression of the prescribed limits, quash the order on that ground.

(1) Before Lord O'Brien, L.C.J., and Gibson and Madden, JJ.

MOTION to make absolute, notwithstanding cause shown, a conditional order for a *certiorari* to bring up to be quashed a sealed order of the defendants, dated the 14th November, 1902.

In the year 1901 a necessity arose in the town of Ballybay, which is situate in the Castleblayney Rural District of the county of Monaghan, for a new water supply and system of sewerage. Accordingly the necessary steps were taken for that purpose by the Castleblayney Rural District Council, as the sanitary authority for the district, which included the district electoral divisions of Ballybay urban and Ballybay rural. By resolution of the Rural District Council, dated the 11th December, 1901, it was resolved that in the case of Ballybay, "Special Expenses" (as defined by section 232 of the Public Health Act, 1878) should be charged on the district electoral divisions of Ballybay urban and Ballybay rural; and a resolution to the like effect was again passed by the Council on the 15th January, 1902. Thereupon schemes were prepared for the works; and by further resolution of the Council of the 20th August, 1902, it was resolved that the scheme submitted by the engineer, Mr. Bergin, should be adopted; and it was at the same time resolved that a statement be placed on the minutes to the effect that, in adopting the scheme, the Council acted on the assumption that the area of charge for the expenses proposed to be incurred would be the district electoral divisions of Ballybay urban and Ballybay rural.

Estimates were prepared for carrying out the schemes as follows:—

For the Water Supply, ...	£2260 3 0
For the Drainage System, ...	2339 17 0
For Legal Expenses, ...	100 0 0
	£4700 0 0

On the 14th November, 1902, the Local Government Board made the sealed order in question in the following terms:—

"*To* the Council of the Castleblayney Rural District, and to all whom it may concern.

"WHEREAS, in pursuance of the provisions of the Public Health (Ireland) Acts, 1878 to 1900, and the Local Government (Ireland) Acts, 1898 to 1901, the Council of the Castleblayney Rural District have incurred, or are about to

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incur, special expenses (as defined by the Public Health (Ireland) Act, 1878) for the purpose of providing a Water Supply and Drainage System, and maintaining the same, at the town of Ballybay, in the said Rural District; and it is provided by the said last-mentioned Act that we, the Local Government Board for Ireland, shall have power to determine on what area of charge, being a contributory place, or consisting of contributory places, any special expenses shall be chargeable;

"AND WHEREAS, a District Electoral Division is a contributory place within the meaning of section 232 of the said Public Health (Ireland) Act, 1878;

"NOW, THEREFORE, we, the Local Government Board for Ireland, do hereby order and determine that the District Electoral Division of Ballybay Rural and Ballybay Urban shall be the area of charge upon which all expenses incurred, or which may be incurred, by the Council of the said Rural District for the purpose aforesaid, shall be chargeable.

"Given under our seal of office this 14th day of November, in the year of our Lord 1902.

"(Signed), H. A. ROBINSON.
T. J. STAFFORD."

The prosecutor, who was a farmer possessed of a small farm in the townland of Drumgoole, which formed portion of the electoral division of Ballybay rural, had obtained a conditional order, dated the 27th January, 1904, for a writ of *certiorari* to quash the foregoing sealed order on the grounds:—(1) that it was made without and in excess of jurisdiction; (2) that the Local Government Board had not power to impose a charge for special expenses on any part of the district of Ballybay rural, inasmuch as it was not a contributory place in, or in respect of, which the special expenses were incurred; (3) that the Local Government Board had no jurisdiction to make the order before the special expenses referred to in the order were incurred; and (4) that the area of charge mentioned in the order was not a contributory place within the meaning of the Public Health Act, 1878.

The allegations upon which the application was grounded were that no intimation was at any time previous to the sealed order of the 14th November, 1902, given to the ratepayers of the Ballybay rural electoral division either to object or approve of the scheme, or to object or consent to the imposition of any rates to be imposed for the special expenses necessary to carry

out and complete the works. No part of the electoral division of Ballybay rural would be benefited by the works, the benefits being altogether confined to the town of Ballybay. At an inquiry held by an inspector of the Local Government Board on the 3rd March, 1903, a number of the rural division ratepayers asked to have their district exempted from the special taxation, to which the inspector replied that the Local Government Board had already fixed the area of charge, and he refused to recommend any change therein to the Board.

The cause affidavit, filed on behalf of the Local Government Board, contained the following:—"The Board do not admit that no part of the electoral division of Ballybay rural will be benefited by the proposed works, and that the town of Ballybay alone will be the place to derive any benefit therefrom. On the contrary, the Board have found, after a considerable experience, that the advantage of a new water supply, or sanitary works, effected in a country district, village, or town, are not confined to the area immediately concerned, but are participated in by those who inhabit the surrounding country. The order of the 14th November, 1902, was only made after a most careful consideration of all the facts." The clerk of the Castleblayney Rural District Council made an affidavit in which he stated that in the year 1901 complaints were made to the Council by a ratepayer living in the electoral division of Ballybay rural that the sewerage of the town of Ballybay was polluting a lake and river in the electoral division of Ballybay rural. The medical officer of health for the district of Ballybay urban and Ballybay rural frequently complained of the state of the drainage of the district, and in the year 1902 the Rural District Council were forced, in the interests of the public health, to cause a scheme for the drainage of the town of Ballybay, and a scheme for the supply of the town with water to be prepared. The District Council were of opinion that the works would be an advantage to the whole district composed of the two electoral divisions. Before the Local Government Act the two electoral divisions were one, and all sanitary expenses were charged upon the whole. The electoral division of Ballybay rural surrounded the town on every side, and the river, which at present received the sewage of the town of Ballybay, ran through eight townlands of Ballybay rural,

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for which it was one of the principal sources of water supply; and the purification of the river by the works would be a great advantage to it. The pipe-line of the waterworks would run through a considerable portion of Ballybay rural, and the water could thus be tapped by the ratepayers, a number of whom were resident gentry living in Ballybay rural. Ballybay rural was badly supplied with water, and a fountain in connection with the waterworks was to be erected at the Laragh cross-roads, in Ballybay rural, for the use of the inhabitants. The usual statutory notices of intention to apply for the order were published, and the ratepayers of Ballybay rural were fully aware of the intention of the sanitary authority to adopt the scheme, and no objection was made by them.

The prosecutor filed an affidavit in reply, in which he stated that there were two rural districts in Castleblayney, No. 1 and No. 2, and the provisional order objected to did not show which Council was entrusted with the compulsory powers. It was rural district No. 1 which passed the resolution of the 11th December, 1901; but this resolution had its inception in certain correspondence between the Council and the Local Government Board in reference to other special expenses, viz. to acquire a site for the street sweeping of Ballybay town, which special expenses were provided for by the second schedule of a provisional order of the 24th April, 1903, on the townland of Corkeeran, and should, in any case, he submitted, have been met, not out of a rate payable by rural ratepayers, but out of the towns improvement rate levied by the Ballybay Town Commissioners, who provided the expense of sweeping the streets of the town. The sealed order of the 14th November, 1902, referred exclusively to water supply and sewerage, and contained no definition of the contributory place which was to be charged with the expense of a receptacle for refuse dealt with in the provisional order of the 24th April, 1903. In the original estimate and report of Francis Bergin, the engineer of the Council, a sum of £50 was set down as part of the expenses of the sewerage scheme which was not earmarked, but which, he was informed and believed, was set apart by the Council and their engineer for the purchase of the refuse receptacle.

There was no foundation for the statement that the works had

since been proceeded with ; nothing had been done with regard to this, except holding the arbitrator's inquiry, as to the value of the lands to be acquired, on the 15th March previous, after the conditional order had been granted by the Court. The suggestion that advantage would be derived in the rural district of Ballybay from the proposed works was wholly unfounded, and the reason why the rural district had been included by the District Council was, that it returned two out of three Unionist members out of a total of thirty-one members, and almost the entire of the proposed rate would be borne by Protestants, and he knew of his own knowledge that some time before the 14th November, 1902, a petition against the proposed expenses was lodged with the Board, signed by nearly all the ratepayers of Ballybay rural, to which no answer was given, and letters were written by several ratepayers of the division of Ballybay rural to the Board, protesting against the expenses being put on their division.

Healy, *K.C.* (with him *T. J. Smyth*), for the prosecutor:—

The first question, viz. whether the expression "expenses incurred" is confined to expenses actually incurred or means future estimated expenses as well, was raised by the defendants in the Court of Appeal in the case of *The King* (*Ballycastle Rural District Council*) v. *The Local Government Board* (1); but as the point was not taken in the conditional order or in the Divisional Court, it was not entertained. It was not decided in the *Ballycastle Case* (1). We submit that the plain meaning of the expression "expenses incurred" in the proviso to section 232 of the Public Health Act, which enabled the Local Government Board to determine the area of charge, being a contributory place or consisting of contributory places, is actual or past expenses. There is nothing in the section to indicate that it may be extended to future or estimated expenses.

We submit that the order is bad on its face as not showing that the expenses incurred were in, or in respect of, the contributory place or contributory places.

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The Right Hon. The Attorney-General and *Chambers, K.C.* (with them *The Solicitor-General* and *Chaytor*), for the Local Government Board:—

Future or estimated expenses are included in the expression "expenses incurred." This is perfectly plain when you read together section 232, enabling the area of charge to be fixed; section 233, which prescribes the mode of raising the special rate to meet such expenses; and section 237, which gives borrowing powers on the credit of the rates. If the construction of the prosecutor is to be adopted, the special rate could not be struck; the money could not be borrowed; and the work could not be done at all. If there are two constructions open, one which would lead to a deadlock, and the other which would afford a reasonable solution, the business view must be adopted: *per* Pollock, B., in *The Queen* v. *The Vestry of St. Mary, Islington* (1). The construction we contend for has been followed for the past fifty years; and on the faith of it some seven millions of money has been expended. Some weight should be given to this fact: judgment of Lord Blackburn in *Trustees of the Clyde Navigation* v. *Laird* (2). See also *Mayor, Aldermen, and Burgesses of West Ham* v. *Grant* (3); and *The Queen* (*Porter*) v. *The Guardians of the Omagh Union* (4).

Upon the second point there is ample evidence that the electoral division of Ballybay rural will be benefited; in any event, it was stated in the Court of Appeal in the *Ballycastle Case* (5) that the Court would not question the determination of the Local Government Board as to how far the benefit extended for the purpose of fixing the area within the prescribed limits.

T. J. Smyth, in reply, referred to other sections of the Public Health Act, 1878, in which the expression "expenses incurred" bore the meaning contended for by the prosecutor, viz. sections 25, 28, 29, 42, 45, 52, 56, 59, 72, 78, 79, 86, 114, 117, 120, 122, 150, 156, 196, 215; also to *Bayley* v. *Wilkinson* (6) and *Cook* v. *Ipswich Local Board* (7).

Cur. adv. vult.

(1) 25 Q. B. D. 523, at p. 526.
(2) 8 A. C. 658, at p. 670.
(3) 40 Ch. D. 331.
(4) 26 L. R. Ir. 619.
(5) [1904] 2 I. R. 270.
(6) 16 C. B. (N. S.) 161.
(7) L. R. 9 Q. B. 451.

LORD O'BRIEN, L.C.J.:—

This is an application for a *certiorari* with the object of quashing a certain sealed order of the Local Government Board, dated the 14th November, 1902. It is impeached on various grounds. The grounds as set forth in the conditional order are, first, "That the Local Government Board had not power to impose a charge for special expenses upon any part of Ballybay rural, inasmuch as it was not a contributory place in, or in respect of, which the special expenses referred to in said order were incurred." The second is, "That the Local Government Board had no jurisdiction to make said order before the special expenses referred to in said order were incurred. That the area of charge mentioned in said order was not a contributory place within the meaning of the Public Health Act, 1878." These are the grounds—they are practically only two—and I will take the ground as to expenses first, that the Local Government Board had no jurisdiction to make the order before the special expenses referred to in the order were incurred. Now that point was not decided by the judgment of the Court of Appeal in the *Ballycastle Case* (1). It was not glanced at at all in this Court; and it certainly, though mentioned in the Court of Appeal, was not decided. I wish to make that plain, because, of course, we are bound by the decision of the Court of Appeal, and must loyally follow that decision. The Lord Chancellor, in his judgment, says:—"Mr. Healy made the bold argument that the order and action of the Local Government Board were entirely premature until the expenditure was authorised; and I am by no means sure that the argument might not have been entitled to much consideration, if the objection had been taken earlier." Therefore, according to the Lord Chancellor, it was not decided. He says it would have been worthy of much consideration. I agree, but he does not decide it. Nor did Lord Justice Fitz Gibbon in any way decide it. Lord Justice Walker says: "The only question which I propose to deal with is whether the sealed order of the Local Government Board of the 11th September, 1902, is one which that Board could lawfully make? That question almost entirely depends upon the true construction of the 232nd and 233rd sections

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of the Public Health Act, 1878." And then he goes on to say that the question of expenses incurred was not raised, and so does Lord Justice Holmes. Therefore, we are not concluded by anything that was done in the Court of Appeal in the *Ballycastle Case* (1), and we approach the consideration of the case with virgin minds.

Now, what is the meaning of the expression "expenses incurred"? Well, I think the meaning of these words is actual or estimated, actual or future expenses. I think that is fully borne out by the 227th section, which goes to show that the money can be raised before the work is done. Otherwise, as the Attorney-General said in his able argument, there would be an *impasse*; the work could not go on because there would be no money. Having regard to the scope and object of the Act and of the 227th section, I think we are justified in holding that the expression "expenses incurred" means actual or estimated expenses. That view has been followed for the last fifty years or so, and upon the faith of that view some seven millions of money has been expended. I am not to be taken as laying down that if I did not think it was the true view, I would be influenced by the practice. Lord Justice Holmes, in a remarkable passage in the *Ballycastle Case* (1), in referring to the argument of Mr. Chambers, said:—"It was said that the Local Government Board has always acted on the assumption that it had jurisdiction under the Act of 1878 to determine that the whole district or any part thereof was the area of charge, and that a contrary decision would lead to great confusion. This is a strong reason for the exercise on our part of caution; but if we form, however reluctantly, the opinion that the Board has misconceived its powers, we are obliged to say, notwithstanding the chaos which Mr. Chambers has threatened, *fiat justitia*." I entirely agree with the Lord Justice.

On the construction of the Public Health Act, and having regard to its scope and object, and to what was contemplated, viz. that money was to be raised as the outlay was made, I think we are justified in holding that "expenses incurred" mean actual or estimated. I think those sections, which are plainly conversant

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with specific instances of work actually done, do not assist us. We are then of opinion that on this point the practice of the Local Government Board was authorised by law. I think it is a matter of satisfaction that our view, founded on the construction of the Act, will operate so as not to cause general confusion.

Now comes the next point, and again let me say that it is our duty here, which we always unhesitatingly discharge, to follow the decisions of the Court of Appeal.

On the point, then, that there was a wrong aggregation, so to speak, of town lands in this case, I don't think there was. Now the maximum unit is a dispensary district. What are these two sets of electoral divisions? They are electoral divisions within the maximum unit. You don't travel outside the maximum unit, you keep within it, and what do we find from Mr. Coyle's affidavit? He says:—"The electoral division of Ballybay rural surrounds the town of Ballybay on every side; and the river, which at present receives the sewage of the town of Ballybay, runs through eight townlands of the electoral division of Ballybay rural, and is one of the principal sources of water supply for the said electoral division of Ballybay rural; and the purification of said river by the said works above referred to will be of great advantage to the said electoral division of Ballybay rural; and I am informed and believe that the river in its present state is a source of danger to the inhabitants. The pipe-line of the waterworks for the town of Ballybay will, I am informed and believe, run through a considerable portion of Ballybay rural, and the water for the supply of the town can thus be tapped by the ratepayers, a number of whom are resident gentry living in said electoral division of Ballybay rural. Portion of the Ballybay rural electoral division is badly supplied with water, and a fountain in connexion with the waterworks is to be erected at the Laragh cross-roads, in the electoral division of Ballybay rural, for the use of the inhabitants thereof." Now what have we? We have both of these sets of electoral divisions distinctly benefited. I think there is a distinct benefit conferred upon them by the works. You have a pipe running through the rural district, and you have this fountain to be erected in connexion with the waterworks at the Laragh cross-roads. Having regard to this fact that they are both within the maxi-

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mum unit, a dispensary district, and that both of these sets of electoral divisions are benefited, and that some portion of the work is to be done in each, we do not think that to uphold this order conflicts in any way with the judgment of the Court of Appeal in the *Ballycastle Case* (1). Certainly the order itself, on its face, is not as clear as I would wish it to be, as I pointed out during the argument. But, after all, we are not to criticise these Local Government orders with that minute criticism which we would bring to bear upon Justices' orders, especially in a case where *certiorari* is taken away (see 261st section of the Public Health Act); and if we regard the facts of the case—in the decision in the Court of Appeal, they looked at all the facts—I think the Local Government Board were within their right in what they did in this case. It is not to be lost sight of that the order purports to aggregate two "*contributory*" places, and if it is essential to the definition of a contributory place that special expenses should be incurred in respect of work to be done in both the areas, I think it should be inferred that some at least of the work was to be done in each set of electoral divisions. It was expressly admitted in the *Ballycastle Case* (1) that no work was to be done in the greater number of the so-called contributory places. It was admitted in the argument of that case that there was an aggregation of maximum units in the greater number of which no work was to be done. This the Court of Appeal held to be the vice of the order; but I think it is admitted that if there was no transgression of prescribed limits the order could not be reviewed on the ground that no benefit had accrued within those limits. Lord Justice Walker said (see p. 292 of the report):—"I quite agree that there is no power to question their determination of how far benefit extends for the purpose of fixing the area within the prescribed limits." The Lord Justice seems to have agreed with the concluding passages in my judgment in the *Ballycastle Case* (1).

The application for a *certiorari* must be refused, but without costs.

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GIBSON, J. :—

The order of the Local Government Board is impeached on two grounds: the first is, that there was no jurisdiction to make the order until the special expenses had been actually incurred; the second is that the order declares that the area of charge is to consist of two contributory places, though the expenses appear from the order to be in respect only of one of such places. The former is a point of much general importance, as it is stated that several millions have been advanced in accordance with the settled practice of the Board, on the assumption that the actual incurring of special expenses is not a condition to the jurisdiction of the Board to combine several contributory places. The latter depends on the effect of the decision of the Court of Appeal in the *Ballycastle Case* (1), which, if applicable, would invalidate this particular order only.

The first question depends on two considerations—(*a*) What is the meaning of "expenses incurred"? (*b*) Is the jurisdiction of the Board to combine contributory places in one area of charge founded on the pre-existence of an ascertained charge for expenses actually incurred as an essential condition?

Much assistance in answering these questions is derived from the corresponding section 229 of the English statute of 1875, which resembles the Irish enactment, but with a different description of contributory places, and without the final clause enabling the Local Government Board to determine the area of charge. Under the English statute the liability for special expenses is thrown on the contributory place or places in respect of which the expenses are incurred by the rural authority; if two or more contributory places derive common benefit from the work, the rural authority can apportion the expenses proportionally, subject to an appeal, and the contributory places which constitute the limits of taxation cannot be altered. Payment from the contributory places is enforced by precept issued by the rural authority (section 230); and section 233 confers on the local authority a power to borrow for the purpose of defraying the expenses incurred and to be incurred. The statute in the

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schedule contains a form of mortgage of the rates to secure sums so advanced.

The words "expenses incurred" are flexible; they may mean—(*a*) expenses incurred and payable as a debt; (*b*) expenses in respect of which contractual liability has been created though no present debt exists; (*c*) expenses which may be incurred. The first meaning is illustrated by *The Sheriff of Tipperary's Case* (1), and many sections of the Public Health Act with regard to recovering expenses from defaulting owners. The *West Ham Case* (2), *Stock* v. *Meakin* (3), and *The Hornsey Case* (4)—all decided on section 257 of the Public Health Act, 1875, which makes liability depend on completion of the works—are examples of the first signification. The second is exemplified by the *Islington Case* (5). An instance of the third meaning is found in section 45, sub-sects. 1 and 2, of the Local Government Act, 1898, which, in an unreported case, this Court construed as extending to expenses to be incurred, the Act of 1898 proceeding upon estimates in a prospective budget. In the second paragraph of section 233 the word "incurred" only is used; but comparison with the first paragraph, where the language is "incurred and to be incurred," makes it difficult to suppose that the word "incurred" has a less extensive meaning.

The particular meaning to be adopted depends on the context, the business requirements of the position, and general principles of rating. Retrospective rating is, as a rule, improper; rating is usually on the basis of estimate. A rural council acting on an estimate of the expenses of a scheme could, I think, borrow and mortgage the special rate to secure the loan, though there was no signed contract with a contractor; and if it could do so, it must necessarily have power to make a rate to pay the mortgage. In the case of general expenses, described in the second paragraph of section 229, prospective current expenses must be included in the words "expenses incurred." In sections 232, 233, and 237 of our statute, the argument in favour of a wide construction of "expenses incurred" is even stronger, as the rateable area depends on the

(1) [1898] 1 I. R. 508.
(2) 40 Ch. D. 331.
(3) [1900] 1 Ch. 683.
(4) 24 Q. B. D. 1.
(5) 25 Q. B. D. 523.

action of the Local Government Board, and no special rate to pay a mortgage could be struck till the area was settled. The Attorney-General referred to earlier legislation *in pari materia* as supporting the same conclusion, *e.g.* 29 & 30 Vict. c. 90, s. 59. I do not deem it necessary to examine these previous statutes, as I am of opinion that the policy, plan, and language of the Acts of 1875 and 1878 show that "expenses incurred" must be understood in the widest sense, and cannot be restricted to actual present debts and liabilities.

Assuming, however, that "expenses incurred" meant expenses actually incurred previously, would this necessarily affect the jurisdiction of the Local Government Board? They are entrusted with power to determine the area of charge, not the proportion of liability between the contributory places; and I can see nothing in the statute which prevents the Board from exercising the power till the expenses are actually incurred. The Board determine the contributory places on which the special expenses, when incurred, shall be chargeable. Until this is done, there can be no ascertainment of rateable area or valid rate.

The first point, therefore, I decide in favour of the Board. The expression "expenses incurred" covers "expenses to be incurred," and in any event there is jurisdiction to determine the area of charge before the exact sum due for expenses is ascertained.

The second question is whether the *Ballycastle Case* (1) governs the present. We have already seen that the concluding paragraph of section 232 is not found in the corresponding English section 229, under which, where expenses are incurred in or in respect of two or more contributory places, they are borne by such places with provisions as to proportional apportionment. The unit of taxation under section 229 is fixed, and cannot be reduced. The liability of each contributory place flows automatically from the construction of the works in, and in respect of, such place. The proviso in section 232 is interpreted by the Court of Appeal, in the *Ballycastle Case* (1), as enabling the Local Government Board to determine the area of charge only in the case of contri-

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butory places in and in respect of which the special expenses are incurred. Without any such power, under section 229 of the Act of 1875, the same result is obtained; and the only operation of the proviso, therefore, is to enable the Board to select what unit is to be adopted in the combination. The Irish units are quite different from the English units: they are ranged in a descending series of four, each of which is self-contained and entire (save the townland), and the area of charge must consist of such entire taxable unit or units. The *Ballycastle Case* (1) determines that units cannot be combined, save where the special expenses are incurred in respect of each. The Attorney-General contends that the decision only applies to the combination of maximum units, and that, it being admitted that the Board possesses absolute power as to the selection of the largest unit where the works are situate, it is absurd that they should not have similar power to combine sub-units carved out of the maximum unit. The Court of Appeal have, however, decided that though the Board are authorised to select the unit or units, the selected units, whatever they are, forming the chargeable area must be places in and in respect of which the expenses are incurred. The difficulty is caused by the rigid character of the contributory places which are to be treated as entire zones—incapable of diminution or modification, save in the case of a townland. A large or small unit may be chosen; but once chosen, it cannot be altered in dimension, just as in the case of malicious injury compensation under the Grand Jury Act, section 135, the taxable unit selected, whether barony or otherwise, cannot be altered. The only fractional treatment allowed is in case of the townland.

Whether the action of the Board in selecting the maximum unit affects the right of the rural authority to apportion between sub-contributory places deriving common benefit, is a matter which does not now require decision.

Though according to the decision in the *Ballycastle Case* (1) only contributory places, the subject of the expenses, can be combined, I do not think that the Court of Appeal decided that the area must consist of places where the works are actually done. If

(1) [1904] 2 I. R. 270.

a pump was put up in one townland for the benefit of that townland and a townland next adjoining, the expenses might well be deemed to be "in respect of" both. Accordingly, if the works at Ballybay benefited the neighbouring rural district, I think the two districts could be united in one taxable area. If the Board had acted on that view (which there was evidence to support), they would have been justified in making the present order, as their jurisdiction does not depend on the actual presence of the physical works in both districts. Though, however, a Board's order may not be like a magistrate's conviction, which must show jurisdiction on its face and is subject to venerable strictness of construction, the recital in the present order strongly suggests that the Board did not proceed on the principle I have suggested, but acted on the view decided in the *Ballycastle Case* (1) to be erroneous. There is no hint in the order of community of benefit having been the reason or motive of making it. Only some of the townlands in the rural district were benefited, and the order only refers to the urban district as that in, and in respect of, which the expenses were to be incurred. Whether if, when this order is quashed, the matter may not be set right by a properly drawn order, I need not now consider. The present form is in any case very loose, not referring to any specific scheme.

Other points were suggested in argument against the validity of the sealed order; but as they were not noticed in the conditional order, I am not called on to discuss them. I am disposed to think that the order cannot be supported, because it purports to violate the principle laid down by the *Ballycastle Case* (1), that only places in respect of which expenses are incurred can be joined. The point is very doubtful, and I am not sorry that my Lord and my brother Madden have arrived at a conclusion in favour of the order, as on the facts there was, in my opinion, jurisdiction to unite the two electoral divisions.

(1) [1904] 2 I. R. 270.

K. B. Div. 1904.

THE KING (POTTS) *v.* LOCAL GOVT. BOARD.

MADDEN, J.:—

I shall state shortly the grounds on which I think the order before us to be a valid one. The case involves two questions—one of far-reaching importance; the other conversant with a single order. As regards the former question, I have little to add to the careful examination of the statute which is contained in the judgment delivered by my brother Gibson. The expression "expenses incurred" would probably suggest to the ordinary reader—if taken apart from any context—that the expenses had been actually incurred; but it does not say so. It is an expression capable of explanation from the general scope of the Legislation contained in the statute in which it occurs.

Mr. Smyth has referred us to a number of sections in which the expression "expenses incurred" is used; but on examining each of them it will be found that, from the nature of the case, the expenses must have been actually incurred before the section could come into operation. There is nothing in the expression "expenses incurred" involving a definition of the time at which they were incurred. They must be incurred at some time. In giving a wider meaning to the expression in the section before us than in those cited by Mr. Smyth, I am influenced by the consideration that the borrowing powers conferred by the statute could not be put into operation if the narrower construction were to be adopted; and on this branch of the case I am in entire agreement with my brother Gibson.

The other question, although of minor importance, goes to the root of the validity of the order under consideration. It appears to me to be perfectly clear on the evidence that each of the electoral divisions, Ballybay rural and Ballybay urban, was a contributory place within the meaning of the Act as construed by the Court of Appeal. The evidence shows that, although the greater portion of the works and the greater portion of the benefit are referable to the urban district, nevertheless, a certain portion of the benefit and a certain portion of the actual physical operations were referable to, and in respect of, the rural district. As I read the judgment of the Court of Appeal, it seems to me to be clear that under these circumstances the Local Government Board could have selected

both of these divisions as contributory areas. The question arises, Has this been done? I was glad to hear my Lord announce a principle of construction with which I am entirely in agreement. It would be a lamentable thing if we were bound to apply to orders of this kind certain principles which we have inherited from our predecessors, and which we are obliged to apply to convictions and orders of magistrates and other inferior tribunals, viz. that nothing is to be intended in their favour, and that everything going to jurisdiction must appear in express terms on the face of the order. I think it would be deplorable if orders of a totally different character, made in the administration of statutes such as the Public Health Act, were to be subjected to a minute and verbal criticism, more productive of ingenious argument than of substantial justice. I prefer to construe this according to the ordinary canon, so as, if possible, to give them effect, when the facts essential to their validity are either admitted or proved. It is true that there is not on this order a distinct statement in so many words that the works were done in respect of each contributory place; and if the rigid principles to which I have referred apply, the order might be open to this infirmity. But looking at the substance of the order, and applying a more liberal canon of construction, I am of opinion that it contains all averments necessary to its validity. It selects both electoral divisions as contributory areas. This could not be done if the works were not in fact referable to both, and the order could not make them contributory by calling them such. But I think I am entitled to read the order when it describes them as contributory, as importing that they are so in the only possible sense, that is, by reason of deriving some common benefit from the order. I decline to adopt a canon of construction which forbids me from intending this much in favour of the order so as to give it the validity and operation which, according to the evidence, it ought to have.

On these grounds I concur with my Lord in holding that the order before us is a valid one.

J. L.

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Jan. 18.

The prosecutor appealed, the same counsel appearing; but the sealed order having been rescinded by the Local Government Board, the Court of Appeal declined to allow the case to be opened, and it was accordingly struck out of the list without costs.

Solicitor for the prosecutor: *J. G. Reid.*

Solicitors for the Local Government Board: *T. T. Mecredy & Son.*

R. D. M.

IN RE ANNA LONG, A BANKRUPT (1).

Appeal.
1905.
Feb. 3.

Bankruptcy—Married woman—Farmer—Carrying on farm independently of husband—Trader—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 5.

A married woman carrying on a farm separately from her husband is not carrying on a trade, and is not a trader within the definition section of the Irish Bankruptcy Act, 1857, and cannot be adjudicated a bankrupt in Ireland.

If a married woman has presented a petition for arrangement with her creditors, under the arrangement sections of the Bankruptcy Act, and her proposal is not assented to, and she is adjudicated bankrupt, she is not estopped from raising the question of the jurisdiction when, in her petition for arrangement and in the affidavits, she described herself as a farmer.

THE bankrupt, Anna Long, was a married woman, residing with her husband near Newtownbreda, in the county of Down. She was possessed of a farm containing about 36 acres, held partly under lease and partly as a yearly tenant, at the yearly rent of £21 4*s.* 6*d.*, where she carried on the business of a farmer independently of her husband. There was a house on the farm where she resided with her husband, and the furniture in the house and the stock on the farm were Mrs. Long's.

On the 4th November, 1904, Mrs. Long presented a petition for arrangement with her creditors to the Local Bankruptcy Court in Belfast, in which she showed the amount due by her to unsecured creditors at £1050, and her estimated assets at £648, leaving a deficiency of about £400. The farm was mortgaged to the Northern Banking Company.

The first private sitting in the arrangement was held on the 12th December, 1904, when, the petitioner's proposal not being assented to by the statutory majority of the creditors, Mrs. Long was adjudicated bankrupt. In the petition for arrangement, and

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

Appeal. 1905. *In re* ANNA LONG.

in the affidavit made by her in the Local Bankruptcy Court, Mrs. Long was described as a farmer, and a married woman. On the 23rd January, 1905, Mrs. Long applied to the Recorder of Belfast for an order rescinding the order made on the 12th December, 1904, adjudicating her bankrupt, and for an order making no rule on the petition for arrangement; or, in the alternative, for an order annulling the adjudication. This application was refused; and Mrs. Long appealed to the Court of Appeal, asking that the order of the 23rd January, 1905, should be reversed, and that the order of the 12th December, 1904, should be rescinded; or, in the alternative, for an order annulling the adjudication.

Serjeant Dodd and *Hanna*, for the appellant:—

Prior to the passing of the Married Women's Property Act, 1882, a married woman could not be adjudicated bankrupt: *Ex parte Holland* (1). Then, by section 1, sub-sect. 5, of the Married Women's Property Act, it was enacted that a married woman, carrying on a trade separately from her husband, should be subject to the bankruptcy laws in respect of her separate property, in the same way as if she were a *feme sole*. But unless a married woman is carrying on a trade separately from her husband, she is not subject to the bankruptcy laws: *In re Gardiner*; *Ex parte Coulson* (2). The mere fact that she is possessed of separate estate does not render her amenable to the law of bankruptcy: *Re Grissell*; *Ex parte Jones* (3). A farmer is not a trader within the definition section of traders in the Irish Bankruptcy Act of 1857 (20 & 21 Vict. c. 60, s. 90). If the act of bankruptcy alleged can only be committed by a trader, the *onus* of proving a trading lies on the petitioning creditor: *Ex parte Salaman*; *In re Taylor* (4). The Court cannot put a wider construction on the word "trader" than what it has at common law; trading must be proved strictly: *In re Parkinson* (5).

(1) L. R. 9 Ch. 307.
(2) 20 Q. B. D. 249.
(3) 12 Ch. D. 484.
(4) 21 Ch. D. 394.
(5) 9 *Times* L. R. 388.

O'Brien, K.C., and *Robert Doyle*, for the assignees :—

The appellant is estopped from denying the jurisdiction of the Court of Bankruptcy, because she presented a petition for arrangement with her creditors under the arrangement sections of the Act. When a person has obtained protection and stayed the action of creditors, she cannot repudiate the jurisdiction of the Court : *In re Semple* (1) ; *In re Bradbury* ; *Ex parte Emery* (2).

Although a farmer is not within the definition section of the Irish Bankruptcy Act of 1857, a wider meaning must be given to "trading" in section 1, sub-sect. 5, of the Married Women's Property Act of 1882. "Trading" is synonymous with business, and must be construed in the same way as it would at common law. In England there is no definition of "trader" in the Bankruptcy Act at all. The Legislature considered that the definition section of traders was not worth retaining, because the Married Women's Property Act was a code apart from itself.

The application to the Recorder of Belfast was too late ; an application for a re-hearing will not be entertained after the time limited for an appeal : *In re Stanger* (3).

LORD ASHBOURNE, C. :—

This is an appeal from the Recorder of Belfast, administering the Local Bankruptcy jurisdiction, raising an interesting question, stated by Serjeant Dodd, as to whether Mrs. Long, the bankrupt, can be adjudicated bankrupt, as a trader, she being a farmer. She had a farm in the county of Down, where she lived with her husband ; the house where she carried on business was on the farm, and the furniture in it was hers. She got into difficulties ; and being in need of money, she presented a petition for arrangement with her creditors to the Local Bankruptcy Court ; but not being able to satisfy the Court on the matter, the case was turned into bankruptcy. The time within which she could apply to annul the bankruptcy elapsed ; she afterwards applied to annul, and the question was discussed before the Recorder, who held that she was a trader and bound by the rules and obligations of his bankruptcy

(1) 12 Ir. Eq. R. 338. (2) 23 L. J. (N. S.) Bankcy. 33. (3) 22 Ch. D. 436.

Appeal. 1905.

In re Anna Long.

Lord Ashbourne, C.

jurisdiction. It was argued that this application was entirely misconceived; that she did not know the law; that whatever was done must be treated as ineffectual; and that she did not come within the bankruptcy jurisdiction, because, under the sections of the Bankruptcy Acts of 1857 and 1872, to which we were referred by Serjeant Dodd, a woman farmer could not be regarded as a trader within the meaning of the bankruptcy code. It was then argued that there was an answer to that, because until 1882 a married woman was in a different category; before that, she could not have a separate business; but now a married woman can have a separate business which she can carry on apart from her husband, and she can be made a bankrupt. But it was pointed out by Walker, L.J., that as her husband could not be adjudicated a bankrupt, as a farmer was not a "trader" within the bankruptcy code, neither could the wife. I heard no answer to that, and I see nothing to lead me to a different conclusion. Having regard to the law and authorities, the wife cannot be regarded here as carrying on trade apart from her husband, merely because she has this farm.

It was then suggested that it was too late for the appellant to raise the point, and that she was estopped by her own acts from doing so. I do not think that is reasonable, having regard to the circumstances here, once we have arrived at a clear conclusion in her favour on the broad question that the view of the Recorder is erroneous in holding that the appellant was to be regarded as a "trader." She was a married woman, who was for a number of years with the incapacities of the law in respect to business contracts, and she made no misrepresentation as to her position. I, therefore, do not think that we should be hampered in giving her the benefit of our decision in her favour on the main question in the case.

In my opinion, the decision of the Recorder of Belfast was wrong, and should be reversed. I have felt some difficulty about the terms upon which we ought to allow the appeal. Mr. O'Brien should, however, get the costs of the assignees down to the argument before the Recorder, to be paid out of the separate estate of the appellant, each side to abide his own costs of the appeal.

FITZ-GIBBON, L.J. :—

There are two questions for decision—(1) Whether the appellant was within the jurisdiction of the Bankruptcy Court? and (2) If she was not, is she estopped, or precluded, from now raising the question?

I cannot read the word "trader" in the Married Women's Property Act in any other sense than that in which it is used in the Bankruptcy Law. Neither in the ordinary meaning of the word at common law, nor according to the law of bankruptcy, was the appellant a trader. Therefore, in my opinion, this adjudication took place against a person to whom the Bankruptcy code did not apply.

Is the appellant precluded from raising the question by the fact that she herself first applied to the Court of Bankruptcy? The strongest authority against her is *In re Taylor* (1); but there evidence might have been given upon which the adjudication could have been sustained. Here, from first to last, the appellant described herself as a married woman, and a farmer; and she never said, or represented, that she was a trader. The Court had not jurisdiction to adjudicate her a bankrupt, and she is not precluded or estopped from pointing out the want of jurisdiction. She never was a trader for the purposes of the proceeding.

We must annul the adjudication, and dismiss the petition for arrangement. We shall order the appellant to pay to the assignees their taxed costs and expenses in the local Bankruptcy Court down to the motion before the Recorder, as this was a proceeding to get rid of the consequences which her own petition brought about: she must undertake not to take any proceedings against the assignees for anything done down to the date of annulment; and there will be no order as to the costs of the appeal.

WALKER, L.J. :—

I concur. Before the Bankruptcy Act of 1872 a farmer could not be made a bankrupt, because he was not a "trader." Since the Act of 1872 a farmer can be adjudicated bankrupt if he is a debtor. But a married woman could not be adjudicated

(1) 21 Ch. D. 394.

Appeal. 1905. *In re* Anna Long. Walker, L.J.

bankrupt under the Act of 1872. Then comes the Married Women's Property Act of 1882, which provides, by section 1, sub-section 5, that every married woman carrying on a "trade" separately from her husband, shall, in respect of her separate property, be subject to the bankruptcy laws. I can understand a married woman being thus made an artificial and statutory trader, but not as a farmer. She cannot be placed in a worse position than a man. Carrying on a "trade" in respect of her separate property, that is the meaning of the section; and I don't think the *status* of a farmer comes within these terms.

Holmes, L.J. :—

Unless I am compelled by law to annul the adjudication in this case, I would not do so, as I see nothing in the appellant's conduct to induce me to favour her. But, in my opinion, she is entitled to have the adjudication annulled. Undoubtedly, she was not a "trader" when she presented her petition for arrangement, nor at any time subsequently; and, consequently, the Recorder had no jurisdiction to adjudicate.

If she had made any representation in her petition that she was a trader, she ought not now to have relief; but from beginning to end she always stated she was a farmer, and a married woman. We are, therefore, coerced to make the order annulling the adjudication.

Solicitor for the appellant: *F. Kerr.*
Solicitor for the assignees: *Samuel Ross.*

R. D. M.

CROFTS *v.* BEAMISH (1).

K. B. Div. 1904. Nov. 27. — *Appeal.* 1905. Feb. 2, 6.

Will—Construction—Gift over—"Next eldest brother"—Restriction upon alienation.

B., by his will, left all his property to his wife for life, and after her death he devised to each of six of his sons a specific portion of his landed property, and to the other (his third) son he left one shilling. He charged some of these lands so devised with portions for his daughters, and he directed that if any of his sons should die before he attained the age of thirty, the portion of him so dying should go to his "next eldest brother, and so on, respectively"; and if any of them should die without issue lawfully begotten after attaining the age of thirty years, then his share should go to his "next eldest brother, and so on, respectively." Proviso, that no devisee should be at liberty to sell his share to any person save one of his brothers, at a price to be fixed by arbitration.

The testator died in 1867, leaving him surviving his widow and seven sons, all of whom attained thirty. G. B., the eldest son, died in 1900, leaving children surviving. Some of the other sons were unmarried, and some were married, but had no children. The widow died in 1903.

On an originating summons, issued for the purpose of obtaining the determination of the Court upon the construction of the will:—

In the King's Bench Division, *held*, by Gibson, J., that the descending scale applied, and that, upon the death of a devisee without issue, the brother next younger in age to the deceased would take.

Held, by Boyd, J., that the limitation over was void for uncertainty.

Held, by Wright, J., that the brother immediately senior to the deceased would take.

Fitzgerald v. *Fitzgerald* (12 Ir. Ch. R. 442) and *Eastwood* v *Lockwood* (L. R. 3 Eq. 487) considered.

Held, per Curiam, that the restriction on alienation was void.

Held, by the Court of Appeal, that by "next eldest brother" was meant the next younger, and not the next elder.

The Court of Appeal declined to decide any other question.

RICHARD BEAMISH by his will, dated the 16th November, 1866, bequeathed all his property to his wife, Susan Becher Beamish, for her life; and after her death, he devised certain landed property to his sons, in the words following:—

"I will and bequeath to my son, the Rev. George Beamish, the

(1) In the King's Bench Division, before GIBSON, BOYD, and WRIGHT, JJ.

K. B. Div. 1904. CROFTS v. BEAMISH.

house and lands of Beaumont, otherwise called Reigngarigeen, in the parish of Kilmalooda, on which I live, together with the dairy-farm now in the care of Cornelius Donovan, altogether about 88 acres, bounded on the north by the Blind River, on the south by the public high road. To my son, Richard Beamish, I will and bequeath my part of the lands of Ahagila, in the parish of Castle Ventry. To my son, Dr. Thomas Beamish, I will and bequeath one shilling, having already given him his share my part of the lands of Cluggah, in the parish of Cluggah. To my son, Henry Baldwin Beamish, I will and bequeath that part of the lands of Reigngarigeen, in the parish of Kilmalooda, now in my possession, bounded on the north and south by the public high roads, together with that part of said lands now in the possession of Richard Perrott, containing together about 126 acres, be the same more or less. To my son, John Beamish, I will and bequeath the lands of Ballylook and part of Dunicove, in the parish of the Island, held by lease for three lives and thirty-one years in reversion, with whatever stock may be on it at the death of my wife. To my son, Becher Hungerford Beamish, I will and bequeath the lands of Carrigfaudah, in the parish of Ross, held from the Ecclesiastical Commissioners; and to my son, William Baldwin Beamish, I will and bequeath the lands of Carrigagrenane, held under same lease as Carrigfaudah, from the Ecclesiastical Commissioners for Ireland. And it is my will, and I do direct, that if any or either of my sons should die before he or they attain their respective ages of thirty years that the portion of him so dying should go to his next eldest brother, and so on, respectively; and if any or either of them should die without issue lawfully begotten after attaining the age of thirty years, that then and in such case his share should go to his next eldest brother, and so on, respectively."

The testator then directed that all the before-mentioned lands should be made liable to a sum of £3000 as a provision for his daughters in the following proportions:—the lands of Ahagila, £600; Carrigagrenane, £750; Carrigfaudah, £750; Beaumont and the dairy-farm, £500; Reigngarigeen and Perrott's Farm, £400. He appointed £500 to his daughter Catherine, charged on the lands of Ahagila, willed to Richard; £500 to Susan, charged on Beaumont, willed to George; £500 to Mary, charged on

Carrigfaudah, willed to Becher; £500 to Anna Maria, on Carrigagrenane, willed to William; £400 to Rhoda, charged on Reigngarigeen, willed to Henry; and £100 charged on Ahagila, willed to Richard; and to Charlotte Sophia, £250 on Carrigfaudah, willed to Becher; and £250 on Carrigagrenane, willed to William.

The will then contained a further clause:—"I direct that if any or either of my sons should, after the death of their mother and after attaining their respective ages of thirty years, be disposed to sell the interest he or they have in the proportion of lands hereby willed to each, that he or they shall not be at liberty to sell to any other person save one of his brothers, and that the value of his or their interest, if there should be any difference between them, should be determined by arbitration by three respectable gentlemen, and their decision as to value shall be final."

The testator died on the 18th November, 1867, leaving him surviving his widow and his seven sons, all of whom attained the age of thirty years. Susan Becher Beamish, the testator's widow, died on the 14th August, 1903.

George Beamish, the eldest son, died on the 2nd March, 1900, having made his will, dated the 24th October, 1893, whereby he bequeathed all his property to Elizabeth Anne Crofts and Jane Crofts (the plaintiff). George Beamish left children surviving him. Elizabeth Anne Crofts died on the 15th May, 1903, leaving the plaintiff the sole executrix and trustee of the will of George Beamish. Richard Beamish, the second son, was married, but had no children. Thomas Beamish, the third son, was married, and had issue. Henry Beamish, the fourth son, was married, but had no children alive; he had a child who died in infancy. John Beamish, the fifth son, was unmarried. Becher H. Beamish, the sixth son, went to Canada, and had not been heard of for ten years: when he went to Canada fourteen years ago, he was unmarried. William Beamish, the seventh son, was unmarried.

All the lands devised were held in fee or fee-farm, except the lands of Ballylook and Dunicove, which were held under lease for lives, and thirty-one years from the death of the survivor of such lives.

After the death of Mrs. Beamish, in 1903, the parties were

K. B. Div. 1904. CROFTS v. BEAMISH.

desirous of having the meaning of the will declared, and, accordingly, a summons was issued under Order LIV., Rule 1, by Jane Crofts, against Richard, Thomas, Henry, John, and William Beamish, for the determination by the Court of the following questions:—

1. What, upon the true construction of the said will, is the meaning of the term "next eldest brother" in the limitation in the said will providing that if any or either of the sons of the testator should die before he or they should attain the age of thirty years, or if any or either of them should die without issue lawfully begotten after attaining the age of thirty years, then his share should go to his next eldest brother, and so on, respectively?

2. Whether the said limitation is void for uncertainty?

3. Whether (if the said limitation is effective) the devisees of a son of the testator who died leaving issue are entitled to the benefits of the gift over in the event of another son dying without issue?

4. Whether the provision in the said will restricting the alienation by any son of the testator of the lands devised to him except to one of his brothers is valid?

H. D. Conner, K.C., and *Linehan*, for the plaintiff.

T. M. Healy, K.C., and *A. M. Sullivan*, for John Beamish.

Redmond Barry, K.C., and *Norwood*, for William Beamish.

M. G. Longfield, for Richard Beamish.

The arguments of counsel were substantially to the same effect as given in the report upon appeal, *infra*.

GIBSON, J.:—

This was an application for a declaratory order with reference to four points arising on the will of a Mr. Richard Beamish. The questions proposed for our decision are as follows: [His Lordship read the questions].

1. If the executory limitation in this case is not void for uncertainty, it is certainly arbitrary and unreasonable on either of the two constructions submitted to the Court. If the language is clear, the Court must give effect to it, however unreasonable

the result; if fairly susceptible of two interpretations, we should adopt that which is least capricious and unreasonable in its operation. The two cases cited in argument are distinguishable. In *Fitzgerald* v. *Fitzgerald* (1) the limitation was "to the next elder brother," and the series ended with the youngest, whose share was therefore free from the gift over and was indefeasible. In *Eastwood's Case* (2) the shifting clause was in favour "of my next surviving son, according to the seniority of age and priority of birth." The testator having named his sons in order of age, it was held that the next surviving son was the son next below the one dying. The word "surviving" would assist this construction, as the elder would be likely to predecease the younger children. I do not quite appreciate the Vice-Chancellor's reasoning that in a series named in age-order the word "next" points, from the nature of the enumeration, to a descending order. "Next" may mean above as well as below, and the construction puts the youngest, who might die first, in a better position than the eldest, as the estate of the youngest would be absolute. A father must be taken to know the relative position of his children as to birth, and whether his will expressly enumerates them in order of age or contains no such enumeration, the meaning of "next eldest" must be the same. The naming of the children does not afford any clue whether the reckoning is to be up or down; if "next eldest" is *per se* uncertain, the introduction of the words in a family series gives no help, and leaves the difficulty where it was. These cases lay down no rule of legal interpretation, and decisions on the particular wording of one will do not govern another where the language, though similar, is not identical.

The two constructions presented in argument are these:—(1) "next eldest" is next below in age, and is the same as "next elder in age or next younger." It is odd that "next eldest," "next elder," and "next younger," should thus all have the self-same meaning. The other construction is that "next eldest" means the brother next senior. This is free from the criticism that "eldest and youngest—elder and younger" are convertible terms and made to bear the same meaning.

(1) 12 Ir. Ch. R. 442. (2) L. R. 3 Eq. 487.

K. B. Div. 1904. CROFTS v. BEAMISH. Gibson, J.

Both of these constructions are open to the objections that the brother at one extremity of the series is free from the shifting clause, and the brother at the other end is in a worse position than any of the intervening brothers. Thus if we adopt the descending construction, the eldest brother who dies without issue can never get anything by the gift over, while the second and other brothers dying without issue may have the loss of their estate recouped by getting the estate of an antecedent brother dying without issue. It is apparently admitted that accrued shares are not carried over, and it would be hard on either of the constructions now under consideration to construe "next eldest brother" as "next surviving eldest brother." The result of either of the constructions would be that George Beamish, the eldest son, had the chance of losing his estate without any possibility of benefit from his brothers' death without issue; each of such brothers on losing his own estate had still the chance of succeeding to his next senior's estate, and William, the youngest, not only enjoyed this benefit but whether he lived to thirty or not, and whether he died without issue or not, would have an absolute estate not subject to any shifting clause. The same difficulty, *mutatis mutandis*, applies to the ascending construction, the apparent inequality of treatment being applied to the youngest, instead of the eldest, brother.

This difficulty has induced me to consider whether the words "next eldest brother" might not receive another interpretation and mean the brother eldest for the time being next at the death, the eldest surviving brother. Such a construction would get rid of the anomalies pointed out as affecting the other construction. In *Bathurst* v. *Errington* (1), Lord Cairns referred to the possibility of introducing survivorship in the case of brothers. The word "next" would in this view point to time and survivorship, and not to immediate local proximity in the series to the brother dying. The use of the superlative "eldest" instead of the comparative might favour this somewhat. It would be intelligible that the eldest for the time being should be benefited; but why the immediate senior or immediate junior should be selected to take under the

(1) 2 A. C. at p. 709.

gift over, I cannot explain. If, however, the testator has so directed, his will must prevail.

The construction I have referred to is not the natural one, and as counsel have declined to support it and have confined themselves to the two already referred to, I have to choose between them if the words "next eldest brother" are not altogether indeterminate and uncertain.

We have here a series of brothers arranged according to seniority. I think the "next eldest" points to the brother dying, the purchaser, as being the true eldest for the purpose of reckoning, and the devolution is therefore downwards and not upwards. This would be the ordinary meaning, according to the usage of common speech. I admit, however, the ambiguity of the expression in relation to the divesting of real estate, where the elder would be nearer true heirship than the younger.

If the will had given an estate to the youngest and on his death without issue to the next eldest brother, the next senior brother must have been meant. Apparently the will was intended to apply the gift over to all the seven brothers, and it may be argued that when the last brother is reached, that is, the youngest or eldest, according as a descending or ascending construction is adopted, the inquiry then must be who is at that time the next eldest. The word is "eldest" not "younger." If a descending and ascending construction could be applicable to the youngest brother, so that if his elder brother died without issue he would succeed, while if he died without issue the elder would succeed to his estate, this would go far to show that the will was uncertain and unintelligible. William would get Becher's estate, and Becher William's.

With much doubt I think that the descending construction applies.

Mr. Longfield argued that the point did not arise for decision, as the gift over was limited to death within the lifetime of the widow, and he relied on the clause restricting alienation in support of his view. If that clause showed that on the death of his wife the testator intended that the devisees should be absolute owners and sell discharged of the shifting clause, I should agree with this contention. But the contention seems inadmissible, inasmuch

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as the limitation over is irrespective of the duration of the wife's life, and the sale contemplated in the restrictive clause relates to the interests of the devisees, which were in fee-simple though in a certain event defeasible.

2. The next question is, does the limitation fail for uncertainty? With hesitation, I have come (as already stated) to the conclusion that *prima facie* "next eldest" contemplates downward computation. This, however, does not dispose of the point. Thomas, one of the brothers, was provided for outside the will, and only gets a legacy of 1*s*. Is he included or excluded among the brothers in whose favour the gift over operates? If it is impossible to answer this, the executory devise might be uncertain. On the whole, I think that Thomas was named for the purpose (amongst others) of including him in the series to get the same chance of benefit as the others, though he had no stake to lose. My answer therefore here is—No.

3. This question at present hardly requires an answer, and we were requested not to answer it. If "next eldest" is not equivalent to "next surviving eldest," and if accrued shares are not subject to the same shifting limitation, notwithstanding the curious words "and so on respectively," a next eldest brother would take the estate of his next senior brother dying without issue, though such next eldest brother had predeceased such senior brother and died without issue: see as to eldest son, *Bathurst* v. *Errington* (1); *Amyot* v. *Dwarris* (2).

4. I am of opinion that the clause at the end of the will does not restrict the inherent power of alienation attached to the devised estates. It is not expressed to be a condition, and though the testator may have thought that his direction effectually prevented alienation outside the family, I doubt if he intended or desired that, on breach by the devisee, the estate should be defeated and the property revest in himself discharged of the limitations over. Even if the clause was a condition, the class of possible purchasers is not the family, or all blood relations, but the brothers surviving at the time are contemplated, and the condition is plainly inconsistent with freedom of disposition, not merely as to the purchasers, but as to the price, which is to be ascertained by

(1) 2 A. C. at p. 709. (2) [1904] A. C. 268.

third persons. The restriction is repugnant to the nature of the estate devised, and is void. The purchasing brothers must be alive at time of sale, and if all but one were to die, there would be no effective power of sale.

The difficulty in construing this will fortunately does not arise in reference to the original estates devised, but only affects the gifts over which, if inapplicable or void, disappear, leaving the original devises absolute and unfettered. What the testator's real mind was, or what it would have been if he had known the result of his language, must be a matter of uncertainty. It looks as if his dispositions were made on the ridiculous assumption that a large family, notwithstanding varieties of health, accident, &c., would die necessarily in order of birth. I doubt if he ever contemplated such a devolution as I think the will has carried out. But his intention must be discovered from what he has said, and no matter how improvident and arbitrary it may be, it must, if discoverable, be obeyed.

BOYD, J.:—

I must confess that I am unable to make up my mind as to whether the testator intended his sons to take in an ascending or descending scale. I do not think he knew himself what he meant. More extraordinary words I have never come across, than those in question, "That the portion of him so dying shall go to his next eldest brother, and so on, respectively." I think the whole provision is absolutely uncertain, and is void for uncertainty.

As to the fourth question submitted to us, I agree in what has been said by my brother Gibson.

WRIGHT, J.:—

The first question is what is the meaning in the will of "next eldest brother"? and while, generally speaking, the language used in one will is useless as assisting in the interpretation of another, it is said that these very words, or words so nearly alike as to be undistinguishable in meaning from them, have been already construed in two decided cases: the cases referred to are *Fitzgerald* v. *Fitzgerald* (1), and *Eastwood* v. *Lockwood* (2). In *Fitz-*

(1) 12 Ir. Ch. R. 442. (2) L. R. 3 Eq. 487.

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gerald v. *Fitzgerald* (1) the provision was for younger sons, "and in case those who die do not leave any wife or children at their death, then the said proportions they were entitled to during their life to go to their next eldest brother, and so on to the *youngest*." It was held that the testator had expressed his intention to give the property in a descending series, inasmuch as he clearly intended to give the shares in such a way that in some events they might ultimately descend to the youngest son, and they could only get to him from the brothers who died by going downwards.

The Lord Chancellor in giving judgment said:—"It is plain that the testator intended to give the different shares so that, in some event, they might ultimately descend to the youngest son; and from whom were they to go to him? From the brothers who died. It is probable that this testator contemplated that the order of the death of his children would be that of their birth, so that each elder brother should die before all those junior to him; then, upon the death of each, the next survivor would be, not in reference to the elder brothers who had died, but in regard of the younger brothers who survived, the next eldest brother; and by following this course, it would eventually come down to the youngest son. This construction provides for all cases except the death of the youngest son; but as my impression is that he expected him to die the last, that is no objection to the construction."

In that case therefore the intention of the testator was found by the Lord Chancellor to be expressed on the face of the will that the shares should go in the descending series. In the other case of *Eastwood* v. *Lockwood* (2), the words of the will are "the share or shares of him or them so dying to go to my *next surviving son*, according to seniority of age and priority of birth" in like manner as his original share. There is a material difference between the language used there, "next surviving son," &c., and "next eldest brother," in the will now before the Court; but, apart from that, Vice-Chancellor Page Wood bases his decision that the shares were to go in a descending order of age on the one fact that the testator had in the first gift arranged his children according to the order of their birth, and that "next" must mean next according

(1) 12 Ir. Ch. R. 442. (2) L. R. 3 Eq. 487.

to his arrangement, *i.e.* downwards or in the descending line. This I think, with all respect, rather begs the question. I cannot regard either of these cases as deciding, or assisting to decide, the language of the present will; and if I am to decide it, it must be on what is expressed in it.

Testator provides first for his wife; then for his seven sons one after the other in order of birth—a natural order, I would think, for any testator to adopt; then for his five daughters—on the death of any or either of the sons under thirty, the portion of the one so dying "to go to his next eldest brother, and so on, respectively"; and the same language is used to meet the case of a son dying without issue after attaining the age of thirty. If the descending order is to be adopted, the eldest son fares worst of all, the youngest fares best. I see nothing in the general frame of the will to favour this view, and to so construe the will involves reading "next eldest" as equivalent to "next younger."

With no decision to guide or to help, and with nothing in the will to throw light on the testator's intentions beyond this one clause, I think the words must receive their ordinary meaning, and that "next eldest" means the next elder brother, at the time of the happening of the event, to a son dying, and that on the death of a son of the testator his share is, by the will, to go to the brother immediately senior to him.

I pass over the second and third questions, and come to the fourth, the provision in the will restricting alienation except to a brother, and deal very shortly with the cases cited in argument.

In *Attwater* v. *Attwater* (1) testator left his estate to his son with an injunction never to sell it out of the family; but if sold at all, it must be sold to one of his brothers. Lord Romilly held this restriction on alienation to be inoperative. In *In re Macleay* (2) Sir George Jessel held that a devise "to my brother J. on the condition that he never sells out of the family," followed by gifts to other relatives, was valid, and distinguishes, and certainly does not mention with approval, Lord Romilly's decision in *Attwater* v. *Attwater* (1). He (Jessel, M.R.) held that the condition there

(1) 18 Beav. 330. (2) L. R. 20 Eq. 186.

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was a limited restriction on alienation, and was good; the test being whether the condition takes away *the whole power of alienation substantially*, a question of substance and not of mere form (p. 189). In *Rosher* v. *Rosher* (1) Pearson, J., held that a condition in absolute restraint of alienation annexed to a devise in fee is void in law as being repugnant to the nature of an estate in fee, even though its operation is limited to a particular time, and that a condition annexed to a devise in fee of an estate to the testator's son, that his widow should have the option of purchasing the estate for a fifth of its real selling value, was an absolute restraint on alienation during the widow's life, and was void in law, and that the son was entitled to sell the estate as he pleased without first offering it to the widow at the price named in the will.

The recent decision of the Court of Appeal in *M'Naul's Estate* (2), overruling *Billing* v. *Welch* (3), turns upon the special provisions of the Renewable Leasehold Conversion Act (12 & 13 Vict. c. 105), and does not deal with the question of a condition in restraint of alienation annexed to the grant of a common law fee-simple estate.

In the present case the testator directs that if any or either of his sons should be disposed to sell his interest in the portion of land willed to him, he or they shall not be at liberty to sell to any other person, save one of his brothers, and that the value of his or their interest, if there should be any difference between them, should be determined by arbitration by three respectable gentlemen, whose decision as to value should be final.

There is thus not merely a restriction as to class (*i.e.* the brothers) to whom a devisee might sell, but on the material question of price or value, the matter is taken out of his hands in case of a difference, and left to a jury of three country gentlemen. In the history of will-making such a power of sale or restriction on alienation was never heard of—practically the power to alienate is completely taken away, and on this question I am glad to find that all the members of the Court agree that this condition is repugnant and void.

(1) 26 Ch. D. 801. (2) [1902] 1 I. R. 114. (3) I. R. 6 C. L. 88.

The King's Bench made the following order :— *K. B. Div.* 1904.

"THE COURT is unable to answer Question No. 1—Gibson, J., being of opinion that a descending construction, Wright, J., being of opinion that an ascending construction, should be adopted, and Boyd, J., being of opinion that the words are uncertain. The Court answers Question No. 2 in the negative. The Court doth not answer Question No. 3, as it is at present unnecessary to do so; and as to Question No. 4, the Court holds that the restriction on alienation is repugnant and void."

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The plaintiff appealed from so much of the order as related to Question No. 1. The defendant Richard Beamish also appealed from so much of the order as related to Questions Nos. 1 and 2 (1).

H. D. Conner, K.C., and *Linehan*, for the plaintiff :—

The Court will not refuse to decide the question on the ground that it affects rights of unborn children : *Freme's Contract* (2).

"Next eldest brother" must mean the next above, or next below, in order of birth. We submit that it means next above, and that "next eldest" must be taken to mean "next elder" : there are fewer difficulties to be overcome by taking that meaning. There is nothing on the face of the will from which any presumption can be made as to the order in which the testator thought the death of his sons would occur ; and so it is impossible to speculate on any intention existing in the mind of the testator upon that ground. The cases cited in the Court below are distinguishable. If a testator make a disposition in favour of his sons, arranging them in a descending order of birth with a gift over of their respective shares in a certain event to "my next surviving son according to seniority of age and priority of birth," the next younger son will take : *Eastwood* v. *Lockwood* (3). So in *Fitzgerald* v. *Fitz-*

(1) In the Court of Appeal, before FITZGIBBON, WALKER, and HOLMES, L. JJ.

(2) [1895] 2 Ch. 778.

(3) L. R. 3 Eq. 487.

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gerald (1), where the bequest was to the "next eldest brother, and so on, to the youngest," it was held that the next younger brother took. But there are no such words in the will here.

A. M. Sullivan (with him *Healy, K.C.*), for John Beamish, contended that "next eldest brother" meant next younger.

M. G. Longfield contended that the operation of the shifting clause should be confined to the life of the testator's wife: *Da Costa* v. *Keir* (2); and that in the alternative the donee under the gift over was uncertain: *Buckley* v. *Buckley* (3); and that the original gift to the defendant Richard Beamish was therefore indefeasible.

Feb. 6.

FITZ GIBBON, L.J.:—

In this matter the six younger sons of Richard Beamish, and the representatives of his eldest son, who is dead, have come into Court on a case stated, with the object of ascertaining "where they are" under his will.

The will may be regarded as almost a family affliction. The words which have led to the litigation are as simple as they can be, and yet in the King's Bench two Judges came to opposite opinions, and the third, not being able to say what the testator meant, did not answer the question at all.

As to this more attractive method of dealing with the case, we are of opinion that where plain English words are used in a document, which must have had some meaning to the person who used them, where there is no context to affect their meaning, and there is no latent ambiguity, a Court of construction can not decline the jurisdiction to declare the meaning. If this were not so, the submission of every question of construction to a Court would be subject to the risk of a denial of justice, in the form of a declaration that the Court, not being sure of the writer's meaning, declined to declare the legal meaning.

But the duty to answer such questions is subject to an important qualification. It is not imperative on any Court of interpretation to answer a question arising on a contingency which has not yet

(1) 12 Ir. Ch. R. 442. (2) 3 Russ. 360. (3) 19 L. R. Ir. 544.

happened; it is at best a matter of discretion to do so; and it is a matter of duty not to answer any contingent question before the contingency has arisen, unless the Court has before it a full representation of every interest that may in any event be affected.

In the present case I am not quite satisfied that we ought not to decline to answer the question until it has arisen, because the complication of possible contingencies is so great, and the questions on the will are so many, that it is difficult to say beforehand that some person may not become interested before the will comes into operation upon the share of any deceased son.

However, the parties have begged us to help them, and there is one question which we may safely answer, namely, what is the meaning in this will of "next eldest brother"? The testator had a large amount of landed property, including freeholds and leaseholds. He had seven sons living, and he left all his property to his wife for her life, and from and after her death he gave a different denomination of land to each of six sons, and 1*s.* to the seventh, for whom he had previously made a provision. He gave the house and lands of Beaumont to George Beamish, part of the lands of Ahagila to Richard, 1*s.* to Thomas, the lands of Reigngarigeen to Henry, the lands of Ballylook to John, the lands of Carrigfoudah to Becher, and the lands of Carrigagrenane to William—a specific gift to a specified son in each case. He had daughters also, and he gave legacies to them amounting in all to £3,000, and he apportioned this sum in varying amounts upon five of the denominations of land given to his sons, leaving one denomination uncharged. He therefore seems to have intended to define the value of each son's share, and he gave an absolute interest to each son, except in the events mentioned in the gifts over. Firstly, he says—"If any or either of my sons should die before he or they attain their respective ages of thirty years, the portion of him so dying shall go to *his next eldest brother, and so on, respectively.*" All the sons attained thirty, therefore that contingency is out of the case. But he goes on—"And if any or either of them should die without issue lawfully begotten after attaining the age of thirty years, then and in such case his share shall go to *his next eldest brother, and so on, respectively.*"

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That gift over teems with contingencies, though it contains none of the words that usually cause trouble, and the words themselves are popular and simple.

The eldest attained thirty and died, but he left children, and no question arises about his share. All the others have attained thirty; several of them have issue, and all of them may have issue. But some of them may have no issue, and the issue of those who have children may predecease their parents. There may be questions whether the will indicates that living sons only are to take under the gift over; and, if not, whether the shares will go to heirs-at-law, or to personal representatives; and whether or how far the original gifts are now vested; but upon these questions we cannot identify the parties interested until the event happens, and accordingly I feel it my duty not to express my opinion on any question of vesting, or of the quantity or quality of estate. But this much is clear, that if any son dies without lawful issue, his share is to go to "his next eldest brother," whoever that may be; all the living brothers are represented here, and we may safely declare which of them will take as against the others. But if the question arises, whether the next eldest brother means the next eldest *living* brother, or whether the real or personal representative of the brother who while living was the next eldest, but who may have died before the gift over takes effect, we cannot answer now. All we can do is to tell these living sons which of them will be "the next eldest brother" to any one of them who dies hereafter. I must say that I cannot entertain a doubt as to the ordinary, and consequently the legal, meaning of these words. I think that the fair test of their meaning is to suppose that we have the testator before us, and can ask him the question. If I asked him, "Who is your eldest son?" he would answer, "George." "Who is the next eldest?" "Richard." "Who is the next eldest?" "Thomas." "And so on, respectively," until he had come to the youngest, "William." If I then repeated the question, he must answer—"I have no more." As to whether that would result in intestacy as to William's share, or whether the will sufficiently indicates that the property is not to be left undisposed of so long as there is any son to take it, we cannot answer, for here again we cannot tell who may be interested

in that question, if it ever arises. But, in my opinion, the "next eldest," when we speak of sons in succession, must mean the next in order of age, beginning at the top, and going down, step by step, in order of birth. Accordingly, we shall declare, on the true construction of the will, that whenever, in case of the death of any son of the testator on whose death a gift over takes place, there is living the brother of such deceased son who came next in order of birth to such deceased, then such son, being a younger brother of the deceased, will be entitled to take under the designation in the will of "next eldest brother"; but that the Court is unable, and declines, to express any opinion as to how the share of such deceased son will devolve in any other event, or upon the happening of any other contingency, no case having arisen to call for the determination thereof, and the Court not having before it the parties who might be interested in any such other event.

There will be no order as to costs. But I may suggest that the parties before us have among them the whole property, and that they would be well advised if they put an end to further questions by a deed of family arrangement.

WALKER, L.J.:—

As regards the word "eldest," this is not a case for putting on it an artificial construction such as we find in cases where a family estate is settled, and the word "eldest" is used referentially so as to include and mean the son taking the estate. Where no such artificial construction is called for, the word must be construed by reference to order of birth, and when the word "next" is used in conjunction with it, the words must mean, I think, the brother who comes first in order of birth *after* the deceased. If the testator had been asked who was his eldest son, and then who was his next eldest son, he would have given ready answers. The words really mean the brother who came next after him. If the eldest born son had died, there could have been no question; and the testator assumed each son would die in the order of birth. The word "next" implies succession, and the construction the brother who came next before the deceased is one which departs from the grammatical construction; "next brother" can only mean the next in order of birth, and "eldest" points to the first in that

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order. The words "and so on, respectively," emphasise this, and in this particular case make the construction clear. There is no uncertainty in the sense in which the word "uncertain" is used in reference to the construction of wills. A gift over to "one of his brothers" would have been uncertain, because it would be impossible to ascertain the object; but the very fact that the words "next eldest brother" can be read in the ascending line or descending line, and the fact that the solution of the difficulty depends on what construction of the words is more in accordance with the grammatical interpretation, and with the intention evidenced by the language, show that the object is not uncertain. If that were not so, every clause in a will difficult of construction would be uncertain. If the gift over had been to his "next eldest," leaving out "brother," the gift would be uncertain. Nor is it like a gift to "my nephew Thomas," the testator having two nephews of the name. Cases of that kind have frequently occurred, and different considerations apply. The moment I am able to arrive at a conclusion, which I do with such clearness as is consistent with another Judge having arrived at a different one, that the words mean the eldest of his brothers next in order of birth, it follows that the gift is not, in my opinion, uncertain and void, for that would be the result. It would probably be the course most consistent with precedent to say we would not answer the questions put to us, as no case has arisen for its determination; but as the parties earnestly desire that there should be some result from the summons, we have framed an answer which will furnish one useful guide for entering upon the consideration of how the share of a deceased son will devolve, though it by no means concludes every question. The real and entire solution of the will involves the happening of events which are not only undetermined but impossible to forecast.

HOLMES, L.J. :—

The testator seems to have had a healthy family. Although he died nearly forty years ago, leaving seven sons, only the eldest has since died; and as he attained the age of thirty and left children, no occasion has as yet arisen for construing the provisions of the will referred to in the summons. I agree, however, that

there can be no objection to decide one question which will probably arise at no distant date, that is, the meaning of "next eldest brother." On this point I entertain no doubt. I give the words the construction that would, I think, occur at once to lawyer and layman, to the scholar and the untaught. The testator had in his mind his seven sons. He naturally thought of the first-born as the eldest, and following therefrom, as a matter of course, the second as the next eldest, to whom the next eldest would be the third, and so on.

I agree therefore in the declaration drawn by Lord Justice Walker; but all other questions must stand over until they arise in a concrete shape.

Solicitor for the plaintiff: *F. Hall.*
Solicitor for John Beamish: *P. W. O'Donovan.*
Solicitors for William Beamish: *T. R. Wright & Sons.*
Solicitors for Richard Beamish: *Corker & Levis.*

R. D. M.

M'ELROY, APPELLANT; FREEMAN, RESPONDENT (1).

Dog—Dog license—Possession of unlicensed dog acquired after 31st March—Summons charging such possession in February of following year—Dogs Regulation (Ireland) Act, 1865 (28 Vict. c. 50), s. 20.

Section 20 of the Dogs Regulation (Ireland) Act, 1865, imposes a penalty on any person who shall, after the 31st March in each year, have in his possession a dog not duly licensed in accordance with the provisions of the Act. F. was charged on summons, under the section, with having, on the 17th February, 1904, had in his possession a dog without having obtained a license. Evidence was given that F. had the dog in his possession on the 17th February, 1904, and that he had got it in August, 1903, and had never taken out a license. The dog was two or three years old:—

Held, that the summons, in merely charging possession of an unlicensed dog on the 17th February, disclosed no offence.

Per Gibson and Madden, JJ.: Section 20 of the Act is not confined in its application to a person who was in possession of the dog before the 31st March, but includes a person acquiring possession of an unlicensed dog after that date.

Quære: If very young dogs come within the Act.

(1) Before LORD O'BRIEN, L.C.J., and GIBSON and MADDEN, JJ.

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CASE STATED under 20 & 21 Vict. c. 43.

The following are the material facts as set out in the case:—

The respondent was charged on summons before Mr. Swifte, one of the Divisional Justices for the Dublin Metropolitan Police District, for that he, on the 17th February, 1904, at 18, Lower Bridge-street, within the said district, kept and had in his possession or custody one dog, without having obtained a license so to do, contrary to the statute. The summons came on for hearing on the 25th March, 1904. It was proved by the complainant, a sergeant in the Dublin Metropolitan Police, that on the 17th February, 1904, he visited the respondent's premises at Bridge-street and there found a large terrier dog, for which the respondent had no license; that the respondent admitted to the complainant that he (the respondent) had got the dog in the month of August, 1903, and had never taken out any license for it. The witness estimated the age of the dog at two or three years.

No application was made to amend the summons by charging possession of the dog in the month of August, 1903.

Counsel for the complainant contended that, inasmuch as the respondent had got the dog into his possession or custody after the 31st March, 1903, he was bound to take out a license for such dog, which license would only continue in force until the 31st March next ensuing; and that the respondent having failed or omitted to take out such license was liable to a penalty under section 20 of 28 Vict. c. 50. Counsel further relied on the construction of section 6 of the said Act.

The respondent did not appear either personally or by solicitor.

Mr. Swifte gave judgment dismissing the summons on the ground that it disclosed no offence (1). On the application of the complainant, he stated the present case to obtain the opinion of the Court as to whether he was correct in point of law in his determination.

The Solicitor-General (*Campbell, K.C.*) and *Cecil Atkinson*, for the appellant.

There was no appearance for the respondent.

(1) Mr. Swifte's judgment is reported in 4 New Ir. Jur. 176.

GIBSON, J. :—

The Dogs Regulation Act, 1865, is singularly ill-drawn. Its main object, as the preamble, form of license, and register show, was to secure the identification of dog-owners, in the interest of persons who might sustain damage from dogs. It had also revenue in view, for it extends to all dogs, including lap-dogs, and sect. 7 has a fiscal object. The statute differs from 30 Viet. c. 5, the English Act, the purpose of which was purely fiscal. That Act compels every person keeping a dog to have a license (sect. 8); the license determines on the 31st December following; and dogs under the age of six months are exempt from duty. The plan of our statute is different. The question before us depends on the construction of sects. 6, 7, 9, 11, 20, 21, and 23, which are not easily reconciled so as to yield a harmonious and certain result. Unfortunately the case has been argued on one side only, but we have the advantage of a careful judgment from the learned magistrate. There are three possible constructions of the legislation, and it is our duty to adopt that construction which best carries out the professed intention of Parliament, and most nearly fits the phraseology taken as a whole.

1. The first construction, which represents the existing Dublin practice, and which has been accepted by Mr. Swifte, is this: a person possessing a dog on, and after, January 1st must take out a license on or before March 31st following; and if he has possession of the dog after that date without a license, he is liable to a penalty. Thus the original defaulter only can be punished. The result, therefore, is that persons becoming possessed of unlicensed dogs after March 31st are outside the provisions as to licence and registration, and for three-fourths of the year the purpose of the Act—the identification of the dog-owner—can be in such case successfully evaded. A man acquiring an unlicensed dog on April 1st, by purchase, gift, or theft, cannot be prosecuted, and the only remedy is against the defaulting predecessor, who, under sect. 20, is to be compelled to take out a license for a dog he has ceased to own.

2. The second construction, which is adopted by the prosecution, is as follows:—Every person at any time during the year in possession of a dog must (subject to the exception in sect. 9) take

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out a license, but the possessor during the first quarter of the year is allowed up to March 31st for that purpose. A person, therefore, acquiring a dog after that date has no free time allowed; he must inquire as to the existence of a license, and if there is no license, he must get one (as in England) at once, subject to the powers of relaxation conferred by section 23. A person acquiring an unlicensed dog immediately before March 31st would suffer very much the same inconvenience.

3. A third construction is this: every possessor of a dog must on or before March 31st procure a license, and if the dog is unlicensed after that day, the original or any subsequent owner keeps the dog *cum onere*. The punishment is inflicted in respect of a dog which could and ought to have been licensed before March 31st. Dogs born after March 31st would not therefore be within the penal clause. On this view, if a dog was duly licensed, on a subsequent change of ownership there would be no liability—apart from sect. 9—to take out a new license. Sects. 6, 7, and 20 appear to contemplate only one license for the year; and once the dog becomes a licensed dog, there is no express obligation cast on a new owner to take out a second license. I shall consider sect. 9 presently. It assumes that some such liability had been created, but it only applies to the lawful acquisition of a licensed dog.

I now turn to the sections, which must be construed not disjunctively, but as one whole. Section 6, taken by itself and without regard to the purpose of the Act, would favour the defendant's construction. The date, March 31st, introduced for the purpose of the register, cannot be treated as immaterial. Three months are allowed for taking out the license. The section says nothing as to subsequent alteration of ownership, or a series of licenses to successive owners. The license is to be for one year from its date. The practice, from the passing of the Act, in Dublin—counsel state that the practice in other parts of Ireland is different—is to make the license run from March 31st to March 31st. Form C., referred to in sect. 11, contemplates that all licenses end at the same time of year; and sect. 20 limits the license under it to March 31st. If, however, a license issued in January must begin to run from that date and ends in the following January, the result to the license-holder would be

the same, as he could not be compelled to take out a new license till March 31st.

The maximum duration of the license would appear to be March 31st after issue. The license issued under sect. 20 must end then. If a license was procured without a prosecution, the period must be the same. This results not merely from Form C, but from the express language of sect. 6, which compels a possessor to take out a license on or before March 31st. This license cannot be dated forward to commence at a period subsequent to March 31st. Thus a license issued in July, if that can be done, could not last till July following, as the new license must be taken out on or before March 31st, and begins to operate at once, or from March 31st at furthest. The literal interpretation of the section might favour the magistrate's view, but the Act must be read as a whole, and a construction of sect. 20 which frustrates the declared intention of the enactment should not be accepted unless no other reasonable meaning is possible.

Sect. 8 provides for the registration of all licenses issued at any time. The next material section is sect. 7, which makes the occupier of any house where a dog lives liable to pay the license duty. It does not refer to March 31st, and it looks more like a substantive enactment than a mere enlargement of the class of persons bound under sect. 6 to take out licenses. If it was intended merely to attribute to the occupier constructive possession or custody of the dog so as to oblige him to take out a license on or before March 31st and bring him within sect. 6, the phraseology adopted is curious and awkward. If the section charges and punishes an occupier who harbours an unlicensed dog coming to live in his house after March 31st, the provision supplies a strong argument that a person becoming actual owner or possessor after March 31st must similarly be liable.

Sect 9 is a difficult one in any point of view. Apart from this section, I can find nothing in the Act, unless sect. 20 has that effect, which expressly requires a succeeding owner, if a dog has been previously licensed, to take out a new license in the same year. The section conveys that Parliament believed that such a liability had been created, and it exempts a transferee by purchase or gift from such obligation; but in default of his registering the new

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certificate, he is liable for the penalties incurred by persons keeping unlicensed dogs. The conditional protection which the section purports to confer applies only to lawful transfer of a licensed dog; it does not extend to the case of a thief or a finder who would not be expected to know as to the ownership or registration of the dog. It leaves the case of an unlicensed dog untouched. Counsel for the prosecution forcibly contend that the Legislature could not have intended that a person acquiring an unlicensed dog should be in a better position than the purchaser of a licensed animal, who must undertake the expense and trouble of registration with the penalty in default of being deemed to keep an unlicensed dog. This absurdity is glaring and unanswerable if the first construction be adopted. Parliament apparently supposed that on each transfer of a licensed dog the new owner would have been compellable, but for sect. 9, to take out a fresh license. Sect. 6 in this view, if properly drafted, should have required every person at any time during the year keeping a dog to take out a license, subject to two provisoes: (1) that the possessor of a dog should have up to March 31st to procure his license; (2) that on transfer of a licensed dog by sale or gift, a new license should not be required if the conditions of sect. 9 were complied with. The section, however, appears to prescribe in terms only one license. Whatever effect be given to sect. 9, it certainly seems adverse to the view that no license need be taken for an unlicensed dog by any one becoming owner after March 31st.

Sect. 20 imposes a penalty on any person after March 31st in possession of a dog "not duly licensed in accordance with the provisions of this Act"; and the Court must order such person to take out a license, which is to be thereupon issued, and which lasts up to March 31st following. Does this mean that a person continuing in possession of a dog for which he ought to have obtained a license before March 31st, alone is within the section—that only the original defaulter can be punished unless the case can be brought within sect. 9? There are weighty objections to this view. The words are "any dog or dogs not duly licensed in accordance with," &c., and not "dog or dogs for which *he* has failed to obtain a license before March 31st." The limitation of the penalty to the original defaulter would go far to

defeat the object of the statute. If the defaulter sold the unlicensed dog on the 1st April, it would seem absurd that such defaulter alone should be punished, and compelled to take out a license for a dog which he has ceased to own. Sect. 9, which includes ownership acquired after March 31st, makes the person who violates the registration clause liable for keeping an unlicensed dog. This looks as if possession of an unlicensed dog after March 31st was *per se* an offence.

The apparent object of sect. 20 was to punish every one in possession of an unlicensed dog after March 31st, and to compel the licensing and registration under sect. 8 of such dog. Any one who gets a dog after March 31st should inquire as to the license. If the dog is licensed, he must do so for his own protection, to bring himself within sect. 9, and avoid its penal clause. If it is not licensed, it is his duty to get a license; he takes the dog *cum onere*: *Reg.* v. *Woodrow* (1). There is no hardship in requiring one who becomes owner of a dog which ought to have been licensed to pay the penalty and take out a license for his dog, by which he can be identified.

Section 21 directs every person in possession of any dog to produce "the license for such dog whenever so required" by several enumerated persons; and in case of refusal, *if licensed*, he is made liable to a penalty not exceeding £5. This section suggests that every person in possession of a dog is expected to have a license for it. According to the view taken below no person getting possession of a dog after March 31st would have a license at all, in cases outside sect. 9. Section 23 introduces a certain amount of elasticity where the default in complying with the Act is accidental, not wilful.

Taking the declared purpose of the Act and the above puzzling sections together, I am of opinion that section 20 is not confined to the original defaulter, and that every one after March 31st in possession of a dog which ought to have been and is not licensed, is punishable and compellable to take out a license.

Whether young dogs, which by reason of their age could do no harm, are within the Act, is not properly before us, save so far as their inclusion or omission may supply an argument. There is no

(1) 15 M. & W. 404.

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express exemption of young dogs. Dogs born after March 31st, would not be the subject of a license to be granted on or before March 31st. But if a dog six months old on March 31st does not require to be licensed as not being such a dog as the Act contemplates, he would be eighteen months old before the next licensing period. Does the Act contemplate such a long period of exemption from license and identification? If the tender age of a dog can make the Act inapplicable, it is unfortunate that no age is prescribed, and that the non-application of the Act should depend on the arbitrary and varying notions of different Justices.

The argument of *contemporanea expositio* cannot prevail. The statute is recent; it is not of a conveyancing character, and if the existing construction conflicts with and nullifies the beneficial provisions of the Act, we must overrule it.

Though I disagree with the opinion of the Law Adviser, on which the judgment below is based, I concur with Mr. Swifte that the summons shows no offence, as it merely charges the possession of an unlicensed dog on February 17th, 1904. It does not appear whether the dog had been licensed by its former owner, or whether it was altogether unlicensed. It would have been difficult therefore to amend, and no amendment was asked for.

My opinion is limited to the case of possession of an unlicensed dog which should have been licensed on or before March 31st. I express no final opinion whether in cases outside section 9, if a dog is once licensed, successive owners must each obtain fresh licenses. The policy of the Act, section 9 and section 20, might support an affirmative answer, but section 6 only speaks of one license. The Act is so drawn as to make a certain opinion on its perplexing provisions impossible, and my conclusion has been arrived at with much difficulty and hesitation.

MADDEN, J.:—

The primary object of the Dogs Regulation (Ireland) Act, 1865, is the protection of the owners of sheep and other property from the ravages of dogs, by affording to them a means of identifying the owners of the offending animals. For this purpose the register established by the Act is to disclose not only the name and residence of the owner, but the colour and description, as far as possible,

of each dog. The small tax of half-a-crown is, in the first instance, devoted to the maintenance of the register to be kept by the Petty Sessions Clerk of each district. In England the tax (7*s.* 6*d.*) is a source of public revenue, in the form of an excise duty. The licensing authority in England is concerned only with the number of dogs kept by each licensee, and no means are afforded by the register of identifying any particular animal.

In carrying out the protective policy of the Irish Act, the statute is divided into two parts. The former (sections 5–18) deals with the construction and writing up of the register. The second, with which we are immediately concerned, is entitled "penalties." The governing section, so far as regards offence and penalty, is the 20th. I cannot find any ambiguity in the following words:—"Any person who shall from and after the 31st March in each year after the commencement of this Act have in his possession or custody any dog or dogs not duly licensed in accordance with the provisions of this Act, shall be liable to a penalty not exceeding two pounds." On conviction, he must be ordered to take out a license, which is to be valid only to "the 31st March next following the date of such license."

This last-mentioned provision is explained by the former part of the statute, for we find in the 6th section that a license ordinarily holds good for a year from and after its date, and, further, that the 31st March in each year is the statutory date before which the keepers of dogs are directed to take out licenses. This part of the Act is open to a good deal of criticism, but I can find no such inconsistency with the portion dealing with offences and penalties as to necessitate a construction that would render the statute practically inoperative. No penalty is imposed on the keeper of a dog who disobeys the statutory direction to take out a license "before the 31st March in each year," which plainly means during the period in each calendar year which precedes that date, that is, from the 1st January. It is strange that the Legislature should have selected the lambing season as that during which the owners of sheep are without a summary method of proceeding against the keepers of unregistered dogs. I do not profess to explain the provisions applicable to the keepers and owners of dogs, respectively, contained in this part of the Act. But the

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9th section is clearly designed in aid of the provisions of the 20th section, as well as for the purpose of securing the writing up of the register. Under this section any person who obtains the possession or custody of a dog from its owner, by sale or gift, can protect himself at a trifling expense against the necessity of taking out a new license during the currency of an annual license. This is, I think, the fair meaning of the section, though it is not very happily expressed. It enacts, however, with sufficient clearness that in default of causing "such registry to be made, such person shall be liable to the penalties incurred by persons keeping unlicensed dogs."

In this view of the Act the summons in the present case discloses no offence and was properly dismissed by Mr. Swifte, for the offence is alleged to have been committed during the period which is uncovered by the section imposing a penalty for non-registration. But although I think that Mr. Swifte was right in dismissing the case, I cannot adopt the proposition that a person acquiring a dog, who has not protected himself under the provisions of section 9, need not register his dog until the 31st of the following March. At the same time, Mr. Swifte did, in my opinion, act rightly in following the view of the law taken by his predecessors during many years. I can find nothing in the statute warranting an inroad on the clear enactment of the 20th section, with the result that the statute would become of even less value than with the interpretation which I put upon its provisions.

Another question of some interest arises as to what is a "dog" within the meaning of the statute. A generic term may have different meanings according to the subject of discourse. The word "man" may be so used as to include a baby. The word "horse" may, according to the context, mean a stallion, or include a filly foal. The word "dog" in this Act means, I think, an animal so matured as to be capable of doing damage to property. Mr. Swifte's suggestion is a reasonable one, that having regard to the preamble of the Act the object was to require dogs to be registered from the age at which their predatory and mischievous instincts might be supposed to be fully developed. There is some support given to this view by the English statute (30 Vict. c. 5). That statute, which is a taxing statute, imposes a duty of 7*s.* 6*d.*

on each dog kept in England, but contains certain exceptions, amongst others an exception in the case of dogs under the age of six months.

LORD O'BRIEN, L.C.J.:—

As I did not wish to travel beyond the exigencies of the particular case, and did not think it necessary to deal exhaustively with the effect of the statute in every supposed instance, I asked my brethren to precede me.

My view may be shortly expressed. In the printed form of summons used in this case the words "from and after the 31st March" were deliberately struck out, and the defendant was charged with the possession of the dog merely in February. The governing section of the Act is the 20th, which provides that "Any person who shall from and after the 31st day of March in each year have in his possession or custody any dog or dogs not licensed in accordance with the provisions of this Act shall be liable to a penalty not exceeding two pounds." "Each year" in the section means, in my judgment, each calendar year. The defendant therefore had up to the 31st of March in the year 1904 to obtain a license, and could not be prosecuted before that date. As the present summons charges the possession merely in February, it is, in my opinion, bad. On the words of the 20th section the defendant, in the present case, which deals with the year 1904, had up to the 31st of March in that year to obtain a license; the prosecution therefore was premature.

Solicitor for the appellant: *Matthew Tobias.*

J. G. T.

K. B. Div. 1904. Dec. 14.

1905. Jan. 19.

Appeal. Feb. 16, 17, 22.

ADDERLEY *v.* GREAT NORTHERN RAILWAY CO. (1).

(1904. No. 6795.)

Railway—Negligence—Evidence of—Liability of Railway Co. for injuries caused to passenger by act of drunken man admitted on their premises.

A. was a passenger by the defendants' railway. F., a drunken man, with a ticket, was admitted to the platform at O. station, and passed the barrier where the ticket-checker was stationed. F. was seen obviously drunk outside, but there was no evidence that there was anything in his conduct to attract the attention of the ticket-checker. F. then attempted to enter a first-class carriage, when the station-master ordered a porter to keep him back. Whilst the porter was leading F. along the platform, F. suddenly swung his arm and broke the window of the carriage in which A. was sitting, A. being severely injured by the broken glass. At the trial of an action for damages brought by A., and founded upon the alleged negligence and want of care on the part of the defendants, a verdict was found and judgment was entered for the plaintiff.

On motion by the defendants:—

Held, by Boyd and Wright, JJ. (Gibson, J., dissenting), that the verdict and judgment should be set aside and judgment entered for the defendants, on the ground that, even if there was evidence to support the finding by the jury of negligence, such negligence was not the *causa causans*, but only the *causa sine qua non* of the accident.

Held, by the Court of Appeal (Walker, L.J., *diss.*), that there ought to be a new trial of the action, as the case was left to the jury on the erroneous assumption that if the drunken man was "obviously drunk," either the neglect to notice that condition, or the admission of him in that condition as a passenger, rendered the Company absolutely responsible for all that he did.

Per Walker, L.J.: There was evidence to support the findings of the jury, and the verdict should stand.

New Trial Motion.

The action, which was tried before Mr. Justice Kenny and a common jury at the Londonderry Summer Assizes, 1904, was brought by the plaintiff, claiming £1000 damages for injuries caused by the alleged negligence of the defendants. The following short summary of the evidence given at the trial is taken from

(1) In the King's Bench Division, before Gibson, Boyd, and Wright, JJ.

the report of the learned Judge. The plaintiff, who was a piano-tuner, was, on the 29th March, 1904, a passenger travelling by a train on the line of the defendant Company from Derry to Fintona, which arrived at Omagh railway station at 12.20 p.m. Shortly before the train left the platform at Omagh station the window of the carriage in which the plaintiff was sitting was suddenly broken by a blow from the outside struck by one Farry, a cattle-dealer, and the plaintiff, who was sitting in the corner seat next the window, was struck by the broken glass, the sight of one eye being seriously impaired. The plaintiff had not seen Farry on the platform prior to the accident, but a witness who was called for the plaintiff swore that he saw Farry a short distance from the station entrance, with two friends, one on each side of him, leaning against a house, in a helpless state of intoxication; a second witness who also deposed to having seen Farry outside the station in a very drunken state, and being helped along by two men, swore that Farry could not possibly have passed an official of the Company without his condition being noticed; that he saw Farry on the platform in charge of a railway porter, who hesitated opposite the carriage in which the plaintiff was sitting, when Farry drew his fist and broke the window, and that Farry, when in the charge of the porter, was moving his arms and in an excited state. The ticket-checker swore that he was standing at the door leading on to the platform when Farry approached with two other men; that there was nothing about him that attracted his attention; that Farry had a season-ticket; and that the witness's attention was directed to preventing the other two men, who had no tickets, from entering the platform. The station-master swore that he saw Farry, who had a third-class ticket, trying to enter a first-class carriage; that he noticed he had some drink in him; that he told a porter to keep the man back; that the porter caught Farry by the arm; and, just as the train was starting, Farry waved his arm and struck the pane of glass.

The following by-law was put in evidence by the plaintiff:—"A person in a state of intoxication, or otherwise in an unfit or improper condition for being a passenger, . . . shall not enter or remain in or upon any carriage using the railway, or in or upon any part of the Company's premises, or any approach to any

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railway station of the Company. Any such person found in or upon any such carriage, premises, or approach, and failing to quit the same immediately upon request by any servant or agent of the Company, may, without prejudice to the penalty prescribed by by-law No. 1, be removed therefrom by or under the direction of such servant or agent."

The further facts of the case are fully stated in the judgments delivered by the Divisional Court.

At the close of the plaintiff's case, counsel for the defendants asked for a direction on the grounds that there was no evidence of negligence or of any breach of duty on the part of the defendants, and that the injuries complained of were not the reasonable consequence of any negligence or breach of duty, if such existed. The learned Judge declined to direct.

The following were the questions submitted to the jury, the answers to which are appended.

1. Was the man who broke the window drunk when he passed through to the platform? *Answer.*—Yes.

2. Did the drunken man pass the ticket-checker in getting to the platform? *Answer.*—Yes.

3. Did the ticket-checker see that the man was drunk? *Answer.*—Yes.

4. Was the man so drunk when he passed the ticket-checker as to be obviously drunk? *Answer.*—Yes.

5. Was the porter at the time the window was broken trying to keep the drunken man away from the train or to get him into a third-class carriage? *Answer.*—He was trying to get him into a third-class carriage.

6. Did the porter then know that the man was drunk? *Answer.*—Yes.

7. If you find that the porter was trying to prevent the man entering the train, did the Company's servants adopt reasonable precautions to prevent him so entering it after they knew he was drunk? No answer.

8. If you find that the porter was trying to put the man into a third-class carriage, was the breaking of the window a reasonable result of the action of the porter? *Answer.*—Yes.

9. Was the accident due to the negligence of the defendant Company in allowing a drunken man upon their platform? *Answer.*—Yes.

10. Assess damages. £850.

Upon these findings, the learned Judge gave judgment for the plaintiff for £850 and costs.

The defendants now moved for an order that this verdict and judgment should be set aside, and judgment entered for the defendants, on the ground that there was no evidence to support the findings and verdict of the jury, and that the verdict was against the evidence and the weight of evidence, and that the injuries complained of were not the reasonable consequence of any negligent acts or omissions on the part of the defendants; or, in the alternative, for a new trial.

Wylie, K.C., Patchell, K.C., and *Perceval C. Gaussen*, for the defendants:—

1. The Judge at the trial should have directed a verdict for the defendants, as there was no evidence of any negligence on their part, or of any breach of duty owing to passengers on their line. The defendants were only bound to exercise reasonable care, having regard to the circumstances of the case, and the knowledge at their disposal. The ticket-checker swore that there was nothing about Farry to attract his attention when he passed the barrier, and there was no evidence to rebut this. When Farry was upon the platform, the defendants took every precaution to prevent an accident. There was no evidence in support of Answer No. 5: *Pounder* v. *North-Eastern Railway Company* (1); *Cannon* v. *Midland Great Western Railway* (2); *Cahill* v. *Great Southern and Western Railway Company* (3).

2. Assuming that there was originally negligence on the part of the defendants in allowing Farry upon the platform, there was no evidence to show that the breaking of the window was the result of anything but an accident. There was no connexion between such accident and the suggested negligence. "The negligence must in some way connect itself, or be connected by

(1) [1892] 1 Q. B. 385. (2) 6 L. R. Ir. 199. (3) 26 I. L. T. R. 17.

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evidence, with the accident," *per* Lord Cairns in *Metropolitan Railway Company* v. *Jackson* (1). In that case there was negligence on the part of the defendants in allowing more than a proper number of passengers to enter a railway train, but no such evidence as could be said to have occasioned the injury complained of. The accident to the plaintiff could not have been foreseen; it was not the "ordinary or likely consequence" to result from the admission of Farry upon the platform: *Sharp* v. *Powell* (2). *Murgatroyd* v. *Blackburn Tram Company* (3), where a mishap was under the circumstances almost certain to occur, is, therefore, distinguishable.

The Company, if guilty of negligence, are not responsible for all the consequences which may, under any circumstances, arise: see judgment of Pollock, C.B., in *Greenland* v. *Chaplin* (4).

Henry, K.C., Todd, K.C., and *Patton*, for the plaintiff:—

[They contended that there was ample evidence in support of the findings of the jury.]

The injuries received by the plaintiff were the direct result of the negligence of the defendants in allowing the drunken man upon their premises, and in not keeping him under proper control when there. They should have enforced their by-law, and removed him from the station. The duty to protect passengers from dangers of this description is incumbent upon a railway company: *New Orleans, St. Louis and Chicago Railroad Company* v. *Burke* (5). It was their duty to keep out the drunken man: *Delany* v. *Dublin United Tramways Company* (6). *Murgatroyd* v. *Blackburn Tram Company* (3) is an express decision in our favour, and is undistinguishable from the present case. Once negligence is found, it is not necessary that the injury should be such as might be reasonably anticipated: *Smith* v. *London and South-Western Railway Company* (7); *O'Gorman* v. *O'Gorman* (8); *Sullivan* v *Creed* (9).

(1) 3 A. C. 193, at p. 198.
(2) L. R. 7 C. P. 253.
(3) 3 T. L. R. 180, 451.
(4) L. R. 5 Ex. 243, at p. 248.
(5) 24 Amer. R. 689.
(6) 30 L. R. Ir. 57.
(7) L. R. 6 C. P. 14.
(8) [1903] 2 I. R. 573.
(9) [1904] 2 I. R. 317.

In *Kerr* v. *Belfast and County Down Railway Company* (1), it was found that the Company did not know that the men who entered the carriage in which the plaintiff was seated were intoxicated. It is clear that if, as in this case, the Company were affected with that knowledge, the plaintiff would have recovered damages.

[They commented upon *Pounder* v. *North-Eastern Railway Company* (2), *Cannon* v. *Midland Great Western Railway Company* (3), and *Cobb* v. *Great Western Railway Company* (4), and referred to the Law Magazine and Law Review, vol. 18, 4th series, p. 49.]

Patchell, K.C., in reply.

Cur. adv. vult.

1905. Jan. 19.

WRIGHT, J.:—

This action, which was tried at the July Assizes in Londonderry before Mr. Justice Kenny and a common jury, resulted in a verdict for the plaintiff for the sum of £850, damages for injuries sustained by him while being carried as a passenger on the defendants' line, owing to the negligence of the defendants' servants.

The negligence relied on consisted in, wrongfully and in disregard of their duty to the other passengers, allowing a man who was obviously drunk to pass the ticket-checker and so get on to the platform to the discomfort and danger of the other passengers. In an altercation or struggle with the porter of the company, the drunken man broke the glass of the window of the carriage in which plaintiff was sitting, some of the fragments of glass were driven into plaintiff's eye, and it is beyond doubt that he sustained serious injury to the sight of one eye at least, for which the jury have awarded him the very substantial compensation of £850.

The jury have answered all the questions submitted to them in favour of the plaintiff. Several of the findings have been attacked as not being warranted by the evidence, and further, defendants contend that the case should not have gone to the jury, and that a

(1) 32 Ir. L. T. 57.
(2) [1892] 1 Q. B. 385.
(3) 6 L. R. Ir. 199.
(4) [1894] A. C. 419.

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verdict should have been directed, and judgment entered for them. The jury have found that the defendants were guilty of negligence, and that this negligence of the defendants (in letting the drunken man pass through the wicket and on to the platform) was the direct and immediate cause, the *causa causans*, of the injury to the plaintiff.

Of all the many cases cited in argument on the one side and the other, the case which most nearly resembles the present, in that it attempted (and successfully) to impose liability on a carrying Company for admitting to their carriage a drunken man to the danger of the other passengers, is *Murgatroyd* v. *The Blackburn and Over Darwen Tramway Company* (1). In that case the female plaintiff, carrying a child in her arms, got up on the outside of an omnibus and had to sit at the end just over the steps, the 'bus being overcrowded; soon after a drunken man got up, and sat opposite to her on the rail, where he sat very unsafely; he was so drunk that he swayed backwards and forwards, and when the 'bus stopped to let down a passenger he lurched forward towards the woman, and, putting out his hands to save himself, caught hold of her, and pulled her forward, with the result that she fell headlong down the steps to the ground and sustained severe injuries, and the child was killed.

The jury found that a drunken man was allowed to get up so drunk as to be obviously drunk, and that the accident was due to the negligence of the conductor in two respects—1, in allowing the 'bus to be overcrowded; and 2, in allowing the drunken man to get up.

The verdict had for the plaintiff on these findings was upheld by the Divisional Court and the Court of Appeal. In the Divisional Court Baron Huddleston (2) said, "There was ample evidence that the man was drunk, and *mischievously drunk*; and as to the conductor's not observing it, the jury thought he ought to have observed it, and came to the conclusion that if he did not see the drunken man get up, he was guilty of negligence, and if he observed him, then he was guilty of negligence in letting him get up on the top of the omnibus."

(1) 3 T. L. R. 180, 451 (2) *Ibid.* 181.

Mr. Justice Manisty, concurring, said that, "having regard to the very serious consequences which might follow, and in this case had followed, from a drunken man being in or upon an omnibus, it was the bounden duty of conductors of omnibuses to take care that drunken men did not get into their vehicles."

In the Court of Appeal, the language of Lord Esher, M.R., in giving judgment dismissing the appeal, is very short and terse. He referred to the evidence given by several witnesses at the trial to the effect that the man was so drunk that anyone could see it, and said that in the face of such evidence it was idle to argue that the jury were not justified in finding that he was obviously drunk. As to how the accident happened, it was a waste of time for the defendants to say that the jury were wrong. If the conductor did not see the drunken man go up on to the top of the car, he ought to have seen him go up. If he was inside collecting fares, the Company ought to have as many servants as were necessary for the purpose of saving the passengers from unreasonable risks.

Pounder v. *The North-Eastern Railway Company* (1) was cited, not that the decision in that case has any special application to the present case, but for a sentence in the judgment of Mr. Justice Smith, at p. 489, where he refers to the cases put in argument, of the Company putting "a known lunatic, a known biting dog, a known leper, or a man known to be *drunk and quarrelsome*, into a carriage with one of the ordinary travelling public"—in any of which cases, he says, "the consequences likely to arise therefrom would be well known to the Company when they contracted to carry the passenger."

The question of the liability of a Railway Company for injury caused to a passenger by the act of a drunken man travelling in their carriage arose in this country in the case of *Kerr* v. *The Belfast and County Down Railway Company*, a reference to which will be found in 32 I. L. T., p. 57, tried on circuit, before Mr. Justice Gibson. In that case there was judgment for the Company, which was upheld by the Queen's Bench Division, but in that case there was a finding by the jury that the Company did not know that the passengers by whom the plaintiff was molested were

(1) [1892] 1 Q. B. 385.

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drunk. In the present case the jury have found—1, that Farry was drunk; 2, that the ticket-checker saw that he was drunk; and 3, that he (Farry) was so drunk when he passed the ticket-checker as to be obviously drunk. And all these findings are, in my opinion, amply supported by the evidence. I refer shortly to the evidence of Hughes and M'Manus, witnesses examined for the plaintiff.

M'Manus, on his way to the station, saw Farry leaning up against a house, "very bad, so bad that he stopped to look at him," with two friends, one on each side; he was in a helpless state, but not noisy. Hughes (another witness), while on his way to the station, saw Farry in a very drunken state helped along by two men. "He was very drunk, he could not possibly have passed an official of the Company without noticing his condition; he was trying to walk, waving his arms, and seemed in an excited state." In the face of this evidence the jury were at liberty to reject as untrustworthy, as they obviously have done, the evidence of the ticket-checker, that he did not *notice* the condition of this drunken man when he came up to the half-door leading into the station, supported by two companions, one on each side.

The jury have also found, despite the Judge's charge, as he reports, that the breaking of the window was a reasonable result of the action of the porter, and that the accident was due to the defendants' negligence in allowing a drunken man upon their platform.

It is, in my judgment, undoubted that the Company was in default in allowing this drunken man to pass through the gate under the eyes of their ticket-checker, and to be upon the platform, more particularly having regard to their 9th by-law, under which they are empowered to remove from their premises any person found there in a state of intoxication. But the question is, Was this negligence of the Company the immediate and proximate cause, the *causa causans*, the effective cause, as Lord Justice Walker calls it in *Sullivan* v. *Creed* (1), of the accident and injury to the plaintiff?

To put a man whom their servants saw to be drunk into a

(1) [1904] 2 I. R. 317.

carriage with other passengers, would admittedly render the Company liable for any injury or evil consequences to the other passengers naturally resulting, or which might be expected to ensue, from such wrongful act. It is practically conceded, and would appear to follow from the cases to which I have referred, that a carrying Company is liable for the violence of a drunken man put by them into a carriage among a number of sober and orderly passengers where they may reasonably suppose from his condition and appearance, and from what is patent to their servants, that there will, or probably may be, some outburst, or something which may interfere with the safety and comfort of the other passengers, as in *Murgatroyd's Case* (1). There are several stages and many phases of drunkenness, and it certainly cannot be contended that the Company, even though guilty of negligence, are liable for all the misdeeds of a drunken passenger, of whatsoever kind, and howsoever caused or provoked, throughout the whole period that he is being carried over their line, or is upon their premises.

In the present case, while there are numerous discrepancies and differences as to matters of detail between the several witnesses, the evidence seems to me to show that the station-master saw that Farry was drunk, and called the porter's attention to him; that Farry, who had a third-class ticket, tried to enter a first-class carriage which he did not succeed in doing, that the porter took hold of Farry because he saw that he was drunk, and also because his attention was directed to him by the station-master, and was either preventing him from entering a carriage, or was, as the jury have found, and the evidence, in my opinion, warrants the finding, putting him into a third-class compartment, and that the drunken man, in the struggle to wrench himself free, and to shake off the detaining hand of the porter, struck the carriage window, and in this way caused the injury to the plaintiff. The original negligence of the ticket-checker was, in my opinion, no more than a *causa sine qua non*, it was not the *causa causans*. The injury to the plaintiff from the blow struck at the window by Farry was a wholly unexpected casualty, not naturally or directly flowing from the

(1) 3 T. L. R. 180, 451.

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original wrongful act of the Company's servant, nor likely to arise from it; it was the result of an ebullition of temper, unexpected and unforeseen, and which could not have been reasonably foreseen. I am of opinion that the verdict and judgment for the plaintiff should be set aside, and a verdict and judgment should be entered for the defendants.

BOYD, J.:—

In my opinion the verdict which has been entered for the plaintiff should be set aside, and a verdict should be entered for the defendants.

The facts proved at the trial were shortly as follows:—

On the 29th of last March the plaintiff was a passenger in a train of the defendants, and at Omagh station was seated in a third-class carriage, with his face towards the engine. That "just before the train left the station the window of my corner was smashed," and he sustained serious injuries to his left eye. On cross-examination he stated—"I did not notice the man who broke the window; the thing happened all of a sudden." The next witness for the plaintiff, Joseph M'Manus, stated that when coming up to the station he noticed a very drunk man leaning up against a house; he had two friends, one on each side; and that he did not know him, and that he did not see the drunken man till the window was broken; the railway porter had him by the arm; and the next thing he noticed was that they started the train without doing anything. On re-examination he stated that the drunk man he saw was in a helpless state, but not making any noise. The next witness, Mr. Hughes, stated "that when driving to the station in an omnibus he saw a very drunk man helped along by two men, and that he could not possibly have passed an official of the Company without his noticing his condition; that after taking his seat he noticed the same drunk man in charge of a railway porter. The porter hesitated opposite the carriage door, and the next thing he saw was that the drunken man drew his fist and broke the window. The porter appeared to be bringing him towards the carriage door. The train started almost immediately; the train was about to start when I saw the man with the porter; the porter was next the train; the *inference* I drew

was the porter was about to put him into the compartment. At Omagh you come up a number of steep steps to get to the booking office, and then there is the half-door to the platform. I was down towards the guard's van." The above was the only evidence given on behalf of the plaintiff on the question of negligence. At the close of the plaintiff's case, Mr. Patchell, K.C., for the defendants, asked for a direction on the ground that there was no evidence of negligence or any breach of duty, and that the injury was not the reasonable consequence of any negligence or breach of duty; and he referred to *Pounder* v. *North-Eastern Railway Company* (1).

I am of opinion the learned Judge should have acceded to the application.

In *The Metropolitan Railway Co.* v. *Jackson* (2), which was an action for injuries received by a passenger in a train which was over-crowded, and at one of the stations other intending passengers opened the door of the carriage in which the plaintiff was seated, the plaintiff stood up to prevent their getting in, and the porters prevented them from doing so. The train started, and the plaintiff, being on his feet, caught the edge of the door, and the porter slammed the door to, and in doing so the passenger's thumb was caught and crushed. The House of Lords held that this evidence did not establish such negligence on the part of the Company as could be said to have occasioned the mischief, and that the Judge ought so to have directed the jury. The Lord Chancellor (Lord Cairns) states the duties both of the Judges and of jurors, and proceeds (p. 198):—"The negligence must in some way connect itself, or be connected by evidence with, the accident."

In *Pounder* v. *North-Eastern Railway Co.* (1) A. L. Smith, J., says (p. 389) :—"To an ordinary passenger the consequence of not providing reasonable accommodation, which is the breach of duty now set up, is certainly not his being assaulted by an independent *tort feasor*, which is the sole injury, or loss or injury, complained of in the present case. The cases put in argument of the Company putting a known lunatic, or a known biting dog, or a known leper, or a man known to be drunk *and quarrelsome*, into a carriage with one of the ordinary travelling public, have no

(1) [1892] 1 Q. B. 385. (2) 3 A. C. 193.

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bearing on the present case, *for the consequences likely to arise therefrom would be well known to the Company when they contracted to carry the passenger.*"

In *Murgatroyd* v. *The Blackburn and Over Darwen Tramway Company* (1) the facts were quite different from the present case. There an obviously drunken man was allowed to get on a tramcar; and when the car suddenly stopped, he toppled over and, in doing so, caught another passenger, and both were precipitated to the ground; and the other passenger (the plaintiff) was injured and her child killed.

In the present case the evidence for the plaintiff is that the drunken man when seen on the street was quiet, and, whether by assistance or otherwise, was able to ascend the steep steps up to the station, and when on the station he was quiet until in the moment of his sudden and unpremeditated action he broke the pane of glass which caused the injuries to the plaintiff. He was in charge of a porter at the time, and there was no evidence except the *impression* of one of the witnesses that he was going to be put into the train. The door of the carriage was fastened, and no effort was made by the porter to open it, and the train started immediately after the accident. From this evidence, I would infer that, having heard the signal for starting, he became desirous of getting away from the porter (who was between him and the carriage) and getting into the train, and made a sudden effort to do so, and by accident broke the window. I do not see how the alleged negligence of allowing the man to get into the station can be reasonably connected with the accident. As I have stated, the man was perfectly quiet until the moment of the accident, and even the plaintiff, who was sitting next the window, and with his face in the direction from which the man and the porter approached, did not notice him or anything to attract his attention until the window was broken.

The learned Judge, however, probably to avoid as far as possible the necessity of a new trial, declined to direct as requested, and allowed the case to proceed.

The only alleged negligence on the part of the defendants is that they permitted a drunken man to pass the barrier and be

(1) 3 T. L. R. 451.

upon the platform. I should like to know at what stage of drunkenness the Company can lawfully prevent a passenger who has his ticket from being upon the platform. I can understand if a man were riotous or disorderly they might exclude him. It would appear to me to be a very serious responsibility to throw upon a ticket-checker the duty of determining whether a passenger was sober enough to be allowed to go on the platform. Innumerable actions against the Company would be the result in case he should exclude anyone. For the defendants there was examined the ticket-checker, who has been in the service of the Company for fourteen years, and stated that he did not see Farry (the alleged drunken man) coming up, but that he came up to him; there were two men with him, and one of them was trying to get in with him. Farry has a season ticket; the other men had no tickets. That he saw nothing about Farry that attracted his attention: he was quiet; he was engaged with the other two men preventing them from getting in; that he knew Farry well, and never knew of his being rowdy, and never saw him drunk; and that he saw one of the other two men staggering; that Farry passed down the platform. It appeared from the evidence that the engine was nearer to the check-gate than the carriages, and Farry must have walked unassisted from the gate along the platform towards the carriages. When he came to one of the first-class carriages, near the engine, the station-master noticed he had some drink taken, and he told M'Clean, the porter, to keep him back, and the porter caught him by the right arm, and the station-master stated that the train at the instant was starting. Farry, I would infer, having heard the signal for the train to start, and fearing he would be left behind, waved his arms to get away from the porter, and accidentally struck the window of the carriage which was opposite to him, and thus broke it. The action of Farry was sudden and unexpected, and did not last a second. The station-master, who was only a couple of yards from him, states "that there was nothing in Farry's appearance and demeanour to lead me to believe he was going to break a window. I believe it was an accident." The station-master also proved that Farry never gave any trouble at Omagh. The porter, M'Clean, corroborated the statements of the station-master, and stated that it was when he caught Farry by

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the arm that he noticed he had drink taken, and that he was not drunk, but only under the influence, and was quiet. After the occurrence Farry left the station, and went off by himself, and said nothing, and did nothing further, and did not exhibit any violence to anyone.

The learned Judge having read to counsel the issues which he purposed submitting to the jury, they suggested others which he accepted, including one, No. 8, from the counsel for the defendants, and he states in his report that upon that question he charged distinctly in favour of the defendants. However, the jury found every issue in favour of the plaintiff, and assessed the damages at the very considerable sum of £850.

On the entire case, assuming that there was a case of negligence which should have been submitted to the jury, I am of opinion that the verdict is one against the evidence, and the weight of evidence, and that it should be set aside.

GIBSON, J. :—

This case raises a very important question, How far a Railway Company is liable for the misconduct of a drunken person knowingly allowed to be on their premises. Such person is legally responsible for the consequences of his own acts; but if his condition and demeanour are such as to expose others to danger—though the particular form of the actual mischief may not have been foreseen—the Company may be liable for injury directly attributable to his condition. Where preventible danger is known to exist, they are bound to do what is reasonably necessary for the protection of their passengers; and they cannot be allowed to enjoy immunity where they permit on their premises persons whose condition from disease, lunacy, or drunkenness is known to them to be a source of peril to others: *Pounder's Case* (1); the remarks on this case, in *Cobb's Case* (2); *Murgatroyd's Case* (3). The liability of the carriers depends on the knowledge of the danger which they possess, or ought to possess. There are several cases on the subject of drunken persons in America: they will be found referred to in the American Digest, 1896, Title, Carriers, p. 1055. They all are based on

(1) [1892] 1 Q. B. at p. 389. (2) [1894] A. C. 419. (3) 3 T. L. R. 180, 451.

knowledge of the danger resulting from the presence and conduct of such persons.

There is an obvious distinction between unintentional acts of a drunken person and wilful misconduct of such person. A man staggering from intoxication might fall on a fragile parcel, or lurching against a passenger, might knock him on the rails. The injury so caused would be the direct consequence of his physical condition; and if the Company knew of such condition and did nothing, they might be made responsible. *Murgatroyd's Case* (1) is one of this class. But where the act is wilful, the question is of greater difficulty. An intoxicated person, like a lunatic, may not be incapable of volition, though he has lost his powers of self-restraint, reason, and moral balance. Where intoxication manifests itself in violent and quarrelsome behaviour, the Railway Company is under a duty to its passengers to protect them from such obvious misconduct; and if injury results from their negligent omission to perform such duty, their neglect may found a cause of action. But where the drunken person is peaceable, the inference of danger to others from assault is not so obvious. There are various stages of intoxication—slight, considerable, and complete—and the likelihood of quarrel or assault is often greater in the earlier stages; much depends on individual idiosyncrasy, which, however, cannot be known to strangers like the Railway Company. On a fair or market day many farmers are unfortunately more or less under the influence of drink. Where no violent or disorderly behaviour exists, it would be difficult for the Company to rely on any objective test—where the customer was able to walk and was not manifestly incapable. If the Company refuse to carry, and an action is brought by the excluded passenger, the jury might find that the passenger was not intoxicated. This risk, however, must be taken whenever the by-law of defendants is applied. If they carry a passenger who they see shows symptoms of peaceable inebriety—whether the drink has been taken before or during the continuance of the journey—are they responsible for every unlawful act which such intoxicated person may do under alcoholic influence? Is a drunken man, who mani-

(1) 3 T. L. R. 180, 451.

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fests no present or immediate signs of violence, like a wild or dangerous animal—*May* v. *Burdett* (1)—or parcel of explosives which, if the Company knowingly carries, it takes at its peril? Such responsibility, if it exists, cannot be restricted to the case of carriers, and would be of general application. That danger of assault is a necessary inference in every case from the mere fact of drunkenness, where there is no apparent violent and disorderly behaviour, I would hesitate to affirm—though drunken persons are sometimes classed with lunatics—in reference to the duty of Railway Companies to the travelling public. A good deal depends on the degree and form of the intoxication, the behaviour and appearance of the intoxicated person, the nature of the act, and the surrounding circumstances. The inference of danger is one of fact which should be drawn by the jury.

With these general observations on the principle of liability, and the distinction between accidental acts, the result of physical incapacity, and intentional acts, the result of the disturbing influence of alcohol on the mind, I turn to the consideration of the pleadings and evidence.

The statement of claim puts forward two causes of action. The first is that the defendants were under a duty safely and securely to carry the plaintiff as passenger. There is no such duty, and this cause of action entirely fails: *East Indian Railway Company* v. *K. Mukerjee* (2). The second is founded on the negligent admission of a drunken man to the Omagh station, with knowledge that he was likely to behave with violence and assault and endanger lawful passengers. This scienter, though a prominent part of the pleading, has not been found by the jury. The case has been argued before us without reference to the pleadings, and the point for our decision is whether upon the evidence and findings of the jury, there was actionable negligence in allowing Farry, the drunken man, to be on the platform, and next the train; and whether such negligence might be deemed the direct cause of the plaintiff's injury. The evidence is as follows: I first take up the narrative of the plaintiff's witnesses.

Farry was seen a short distance from the station by M'Manus

(1) 9 Q. B. 101. (2) [1901] A. C. 396.

in a very bad state of drunkenness, leaning against a house and with a friend on each side. He was in a helpless state, but not making any noise. Hughes observed him about two minutes' distance from the station, trying to walk, waving his arms and in an excited state. He was very drunk, and was helped along by two men. He could not possibly have passed an official of the Company without his condition being noticed. When M'Manus reached the station, he passed the ticket-collector, who checked his ticket. There were only a few people at the station, and none coming out. Hughes, who found the train arrived when he came, also says there were none coming out, and there was scarcely anyone on the platform. The circumstances of the injury are described by Hughes. Sitting with his back to the engine, he noticed the porter bringing Farry towards the carriage door, and he thought he was about to put Farry into the compartment. The porter was holding Farry's left arm, and was next the train. The porter appeared to hesitate opposite the carriage door, and Farry drew his fist and broke the window, knocking the fragment of glass into plaintiff's eye. The train started almost immediately after this. The porter and Farry were coming from the direction of the barrier, and the porter was not pulling Farry from the carriage.

The story of the railway officials is as follows:—White, the ticket-checker, says there were a number of people leaving and coming in, thus contradicting M'Manus and Hughes. Farry came up with two men, one of whom tried to get in with him. There was nothing about Farry that attracted White's attention. It was his duty to keep drunken men out (see the by-law); one of the two men was staggering. Irvine, the station-master, first noticed Farry trying to get into a first-class carriage near the engine, about half a carriage length from the station-door; he had some drink in him. Irvine told the porter, M'Clean, to keep him back. The porter caught him by the arm; the train at the instant was starting. Farry waved his arm and struck the glass. M'Clean and Farry were standing motionless, the former keeping him back. The engine was to the left side of the platform entrance. M'Clean, the porter, says he caught Farry by the right arm when he was trying to enter a first-class carriage a minute before the train started; they were coming down the platform when Farry threw

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order. The words "and so on, respectively," emphasise this, and in this particular case make the construction clear. There is no uncertainty in the sense in which the word "uncertain" is used in reference to the construction of wills. A gift over to "one of his brothers" would have been uncertain, because it would be impossible to ascertain the object; but the very fact that the words "next eldest brother" can be read in the ascending line or descending line, and the fact that the solution of the difficulty depends on what construction of the words is more in accordance with the grammatical interpretation, and with the intention evidenced by the language, show that the object is not uncertain. If that were not so, every clause in a will difficult of construction would be uncertain. If the gift over had been to his "next eldest," leaving out "brother," the gift would be uncertain. Nor is it like a gift to "my nephew Thomas," the testator having two nephews of the name. Cases of that kind have frequently occurred, and different considerations apply. The moment I am able to arrive at a conclusion, which I do with such clearness as is consistent with another Judge having arrived at a different one, that the words mean the eldest of his brothers next in order of birth, it follows that the gift is not, in my opinion, uncertain and void, for that would be the result. It would probably be the course most consistent with precedent to say we would not answer the questions put to us, as no case has arisen for its determination; but as the parties earnestly desire that there should be some result from the summons, we have framed an answer which will furnish one useful guide for entering upon the consideration of how the share of a deceased son will devolve, though it by no means concludes every question. The real and entire solution of the will involves the happening of events which are not only undetermined but impossible to forecast.

HOLMES, L.J. :—

The testator seems to have had a healthy family. Although he died nearly forty years ago, leaving seven sons, only the eldest has since died; and as he attained the age of thirty and left children, no occasion has as yet arisen for construing the provisions of the will referred to in the summons. I agree, however, that

there can be no objection to decide one question which will probably arise at no distant date, that is, the meaning of "next eldest brother." On this point I entertain no doubt. I give the words the construction that would, I think, occur at once to lawyer and layman, to the scholar and the untaught. The testator had in his mind his seven sons. He naturally thought of the first-born as the eldest, and following therefrom, as a matter of course, the second as the next eldest, to whom the next eldest would be the third, and so on.

I agree therefore in the declaration drawn by Lord Justice Walker; but all other questions must stand over until they arise in a concrete shape.

Solicitor for the plaintiff: *F. Hall.*
Solicitor for John Beamish: *P. W. O'Donovan.*
Solicitors for William Beamish: *T. R. Wright & Sons.*
Solicitors for Richard Beamish: *Corker & Levis.*

R. D. M.

M'ELROY, APPELLANT; FREEMAN, RESPONDENT (1).

K. B. Div. 1904. Oct. 25. Nov. 3.

Dog—Dog license—Possession of unlicensed dog acquired after 31st March—Summons charging such possession in February of following year—Dogs Regulation (Ireland) Act, 1865 (28 Vict. c. 50), s. 20.

Section 20 of the Dogs Regulation (Ireland) Act, 1865, imposes a penalty on any person who shall, after the 31st March in each year, have in his possession a dog not duly licensed in accordance with the provisions of the Act. F. was charged on summons, under the section, with having, on the 17th February, 1904, had in his possession a dog without having obtained a license. Evidence was given that F. had the dog in his possession on the 17th February, 1904, and that he had got it in August, 1903, and had never taken out a license. The dog was two or three years old:—

Held, that the summons, in merely charging possession of an unlicensed dog on the 17th February, disclosed no offence.

Per Gibson and Madden, JJ.: Section 20 of the Act is not confined in its application to a person who was in possession of the dog before the 31st March, but includes a person acquiring possession of an unlicensed dog after that date.

Quære: If very young dogs come within the Act.

(1) Before LORD O'BRIEN, L.C.J., and GIBSON and MADDEN, JJ.

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direct result of defendants' negligence in allowing Farry, obviously drunk as he was, on the platform, in close proximity to the train? The questions were based on those in *Murgatroyd's Case* (1), where the case was of a somewhat different type, and the inference of danger was irresistible. A woman was on the top of an overcrowded tramcar, and the proximity of a drunken, staggering man beside her was manifestly a peril. In my opinion the question of direct causation in this case depends on the existence of danger which defendants ought to have foreseen might result in mischief of this kind, though the specific harm was not anticipated.

The points on which actionable liability (if any) must be rested are as follows:—Immediately before entering the station Farry was so drunk that he could not move without support; he was excited and waving his hands. Obviously drunk he was let on the platform a few moments after; though able to stand, he was probably in a state of unstable equilibrium: he had lost his power of self-control. After trying to enter a first-class carriage, he was held back and struggled; and at the time when he broke the window, he was being held by the porter, whose action may be taken to indicate that it was thought necessary to keep Farry under physical control. The porter probably held Farry for the protection of the latter; but if Farry in a drunken lurch had reeled against and broken the window, it would have been difficult to say that plaintiff's injury, so occasioned, was not the result of defendants' negligence in letting Farry in, or not removing him from the station. The blow was probably a casual, purposeless movement on the part of Farry, trying to get free. Even if it was intentional, it was a hazardous thing with a human animal, without reason, or with clouded reason, heated with drink, striving to enter the train, to hold him close to, and within such distance of a carriage, that a blow, purposeless or otherwise, or a fall might injure passengers. What an irrational being, whether his mental infirmity is the result of natural lunacy or of drunkenness, will do next, no stranger can forecast. The plaintiff's injury was certainly attributable to Farry's presence on the platform beside the train, and to his intoxicated state known to the railway staff. If the

(1) 3 T. L. R. 180, 451.

porter was attempting to put Farry into a third-class carriage, he did something which exposed other passengers to risk; and his denial that he had any such intention (if false) emphasizes the knowledge of the risk of harm. On the other hand, if he was holding Farry back, why did he not put him out of the station, or at least keep him at a safe distance to avoid danger from his drunken struggle to enter the carriage?

With some doubt, I think that the appearance, state, and conduct of Farry justified an inference that the railway servants were aware, or ought to have been aware, that his presence was a source of danger, and might result in some such kind of violence as caused the plaintiff's injury. The by-law is relied on in this point of view as showing that the Company recognized drunkenness (without overt violence) as a peril and a nuisance. Whether Farry's condition was a danger to others, and whether the defendants ought to have known such danger, depends (as pointed out in *Sullivan* v. *Creed* (1)) on experience—a matter peculiarly for a jury. That the particular result was not foreseen is immaterial, if mischief of this class should have been perceived: Holmes on the Common Law, pp. 147-162. On the entire evidence, I think there was a case of actionable negligence, causing injury, which could not have been withdrawn from the jury.

I have felt difficulty also from the absence of specific findings —to which I have already adverted—particularly as to the knowledge of danger. The questions were, however, based on those in *Murgatroyd's Case* (2) (where, no doubt, the danger was obvious from the physical incapacity of the drunken man). No other questions were suggested; it was assumed that the controversy (if the defendants were not entitled to a direction) would be determined by the answers to such questions; they must have been explained by the learned Judge when dealing with the evidence; there was no objection to his charge; and having regard to the course of the trial (see *Macdougall* v. *Knight* (3)), a new trial ought not to be directed merely to obtain specific findings as to knowledge of danger and other matters which are probably implied and involved in the existing findings.

(1) [1904] 2 I. R. 317. (2) 2 T. L. R. 180, 451. (3) 14 A. C. at pp. 199, 200.

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It was further argued that, even assuming that the admission of Farry drunk to the platform by itself might have made the Company liable for the consequences of his drunken misconduct, the chain of causation was broken when the porter caught and held him, and, there being no express finding that the porter was negligent, the blow must be considered as only a remote result of the initial wrongful admission. I cannot accept this argument. When the Company by their servants were aware that Farry was drunk and dangerous, they were bound to do what was reasonably necessary to save their passengers from such danger. The porter, holding Farry beside the train, was unable to control him. The jury held that the misfortune was the proximate result of Farry's being allowed on the platform, and nearness to the carriage. They were not asked to discriminate between the negligence of the various officials, or the various stages of such negligence. The argument before us has been, not that there should be a new trial, but that verdict and judgment should be entered for the defendants on the ground that the damage was too remote. As already stated, I would have preferred somewhat different questions, the nature of which I have already indicated; but the trial was conducted on the assumption that the questions formulated would determine the rights of the parties, and I do not feel at liberty to send the case to a new trial where I have no doubt that the jury would have answered the questions I have suggested against the Company, and the points were probably fully dealt with by the learned Judge in his charge in reference to the questions actually put.

The defendants' counsel at the bar did not ask for a new trial on the ground that the damages were excessive. They are much larger than I would have given, but the medical evidence for the plaintiff that there might be complete loss of sight (though, no doubt, speculative), and the absence of any countervailing evidence for the defendants, who did not examine the oculist employed by them to inspect and test the plaintiff, would make it difficult to interfere with the verdict on this ground.

I have, therefore, arrived at the conclusion that, though the case is a difficult one, the plaintiff's injury might be deemed the proximate and natural result of the defendants' negligence, and

that the verdict of the jury based on that view must, therefore, stand.

R. ST. J. C.

The plaintiff appealed to the Court of Appeal (Fitz Gibbon, Walker, and Holmes, L.JJ.).

D. S. Henry, K.C., and *A. Todd, K.C.* (with them *Patton*), for the appellant.

J. O. Wylie and *J. R. Patchell, K.C.* (with them, *Gaussen*), for the respondents.

The arguments were the same as in the Court below.

FITZ GIBBON, L.J. :— Feb. 22.

The plaintiff sues, as a passenger of the defendant Company, for damages for an injury sustained while he was sitting in a carriage of the Company at the Omagh platform. He was sitting next the window, on the platform side. The injury was done by the violence of a drunken fellow-passenger, who, standing on the platform within reach of the window, struck out suddenly, broke the window, and seriously injured the plaintiff's eye. The case has so far resulted in a trial at the Derry Assizes, at which a common jury returned a verdict for the plaintiff with £850 damages. In the King's Bench Division the Court was divided. One member of the Court upheld the verdict, another was of opinion that there was evidence of negligence against the Company in admitting the drunken person to the platform, but apparently he was not satisfied that the chain of cause and effect between that admission and the injury was sufficiently established to render the Company liable. On that ground he concurred in the order that judgment should be entered for the defendants; but the opinion of the third member of the Court, who joined in the order, apparently rested rather upon the absence of sufficient evidence of negligence, than on the absence of sufficient proof of connection between the injury and the neglect; and he concluded—assuming that there was a case of negligence—by saying

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that the verdict was against the weight of evidence, and that it should be set aside. As I hold that there must be a new trial, I cannot discuss the evidence in detail, but I must refer to it sufficiently to explain my view of the duty of the defendants, and the application of the facts to the law, as I understand it. The amount of the damages, and the extent of the injury, were both serious; but the importance of the legal principles which are at stake, as to the duties and liabilities of Railway Companies in respect of passengers more or less under the influence of drink, appears to me to transcend anything concerning the present plaintiff.

I must distinctly say, at the outset, that in my opinion it is impossible to withdraw from the jury the evidence of breach of duty which the facts supply against the defendants, and if I was satisfied that the jury had found their verdict, and had assessed the damages, on due consideration of the measure of the defendants duty, I should hold that we had no jurisdiction to interfere.

The circumstances of the case may be shortly described. The train in which the plaintiff was seated was at rest. But it was just about to start, and it is not immaterial to determine how near it was to the point of starting when the injury occurred. The plaintiff was on his journey, sitting in a nearly empty compartment, at an intermediate station. He was where he had a right to be, and where he had a right to be protected by a due exercise of reasonable care on the part of the Company, so that he might attain the object for which he had paid his fare, that of completing his journey with ordinary comfort and in personal safety.

The story of the man who did the injury is not an uncommon one. He was seen approaching the station manifestly under the influence of drink, and exhibiting signs of excitement. He had a season ticket, and therefore, if not otherwise disqualified, he was entitled to enter the station and the train. At the outer door of the station it was the duty of an officer of the Company to check the tickets of all intending passengers. He checked the ticket of this particular man, and he passed him into the station. After he got into the station and on to the platform, perhaps in consequence of his condition—he was attempting to enter a first-class carriage,

having only a third-class ticket. A porter seeing what he was at, and doing his duty, stopped him. Almost at the same moment, the station master, the most responsible representative of the Company, and answerable for maintaining order, saw what was going on, and called out to the porter, "Keep that man back." Whether he did this merely because the train was on the point of starting, or whether he did so because he saw that the man was not in a proper condition to travel, may be doubtful; but, whatever the reason was, this direction was not obeyed. The porter, who had stopped the man from entering the first-class carriage, really took personal charge of him. He took him under the arm, and proceeded to walk with him parallel to the train, in the direction away from the engine, alongside and within arm's length of the carriages. He passed at least one first-class carriage; and though the evidence may not be quite clear, I think that down to the moment when the injury happened, the train had not begun to move. The time that elapsed between the injury and the starting of the train was certainly very short, but the injury was done while the porter, arm-in-arm, was conducting the drunken man along-side the train. The immediate motive or occasion of the act of violence that did the mischief is doubtful. It may have been a sudden perception that he was going to be left behind, or a sudden spasm of intoxication, or an angry gesture; but whatever was the motive or occasion, the drunken man struck out and, whether with his fist or hand, and whether with or without any definite intention, he broke the window, close to which the plaintiff was lawfully and quietly sitting, the glass flew into the plaintiff's eye, and the injury was sustained.

The evidence of the ticket-checker at the gate, and of the porter on the platform, has been subjected here, and at the trial, to observation. The jury are the ultimate judges of the truth. We have no right to discuss what is within the exclusive jurisdiction of the jury. The main questions submitted by the Judge to the jury, and to which no substantial objection was made at the trial except that there was no sufficient evidence to sustain them, were divided into two classes: the first concerned the conduct and responsibility of the ticket-checker in admitting this drunken man to the defendants premises; and the second question

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related to the conduct of the porter who took charge of him on the platform. To these were added the question about cause and effect, and the question of damages.

The wording of the principal question about the ticket-checker was taken from the judgments in *Murgatroyd's Case* (1), and I must observe that it is, in my opinion, almost impossible to apply words relating to the particular facts of one case to the facts of another, without creating difficulty. In *Murgatroyd's Case* (1) a man "obviously drunk" was permitted to mount a London omnibus which was at the time greatly overcrowded. When he got on to the top of the bus, there being no seat for him he propped himself against the side rail. Lurching forward from that unstable position, he precipitated a woman and her child down the steps. The child was killed, the woman was severely injured, and an action for damages was brought. The questions in that case were in every respect apposite to its facts; but they cannot be applied, as if they were mathematical definitions, to every case where a drunken passenger does mischief, without altering and extending their effect. On the Omagh platform the state of facts was wholly different from what it was on the top of the London omnibus. Before I can apply the unqualified terms defining the responsibility of the London Company with respect to the conduct of a person who, when obviously drunk, was allowed to mount the omnibus and balance himself against the side rail, while in motion, to the case of an intoxicated passenger on a railway platform, I must compare the circumstances, because, in my opinion, the measure of reasonable care depends on them, and the duty and responsibility are not unqualified or absolute. To permit a man obviously drunk to stand—or try to stand—on the top of a moving omnibus, where there was no seat for him, appears to me to warrant the statement of the law in the terms applied to that case. But the questions put to the jury, and the arguments addressed to us, in this case, appear to me to rest on the assumption that once a man visibly under the influence of drink has been permitted by a ticket-checker to enter a railway station, the Company becomes absolutely responsible for everything he does. This assumption

(1) 2 T. L. R. 180, 451.

appears to me to be incompatible with common sense, and unsupported by law, at least in a country where total abstinence is far from universal. The same observation seems to me to apply to the conduct of the porter. At the trial, the question whether the man was "obviously drunk" when he was allowed to pass the door was treated as decisive, and it was assumed that once he was permitted to enter the premises, if the checker ought to have seen that he was not sober, this was in itself evidence of negligence sufficient to maintain the action. Similarly, as regards the porter, the question really debated was whether at the moment of the mischief the porter was engaged in trying to place him in a third-class carriage, and to let him go on his journey. It is a mere detail whether he was trying to find an empty compartment for him, or to put him into the charge of a friend, or to put him into the compartment where he broke the window; the real question that was tried, and treated as decisive, was whether the porter was conniving at a drunken man's being allowed to travel at all?

Counsel for the plaintiff have relied on a by-law as a legal foundation for the extreme measure of liability adopted at the trial. The by-law is in terms a positive enactment that if any person under the influence of drink is found on the premises, he *shall* be forthwith removed; and I read this as an equally positive enactment that he shall not be admitted. What is the scope of that by-law?

Does it make the admission, or non-removal, of a person under the influence of drink illegal, and so illegal that the violation of it, or any delay or neglect in acting on it, entails the absolute responsibility consequent on the commission of a crime? I cannot think so, especially as I find an equally Draconic law as to any person who plays any game of chance on the Company's premises.

But I do not think that the by-law is to be overlooked in measuring the duty of the Company, and furthermore I do not think that its scope is limited to clearing railway premises of objectionable people. It indicates to my mind the duty to protect sober passengers from annoyance or injury by drunken men, and it empowers the Company to remove them. But when the

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Company chooses to accept a drunken passenger, the measure of responsibility is to be governed by the same principle which regulates the responsibility of carriers of dangerous things. A carrier who accepts a dog, or a carboy of vitriol, does not become absolutely answerable for everything that may happen, but he accepts a responsibility, and he undertakes a duty, regulated by the nature and circumstances of the case. It was the duty of the man who checked the tickets to use reasonable care to admit no one who was dangerous, and if he did allow a man to come in who was, in the words of the jury, and of *Murgatroyd's Case* (1), "obviously drunk," it became the duty of the Company to take due and reasonable care, having regard to his condition, to prevent any inconvenient or injurious consequences to other passengers arising from his condition. That duty was undertaken by the porter, when he prevented him from entering a wrong carriage.

The duty of the porter then was to use all reasonable care to see that the man of whom he took charge should not get the opportunity of doing any mischief reasonably likely to be done by a drunken man. But I am not satisfied that it was his absolute duty to prevent him from travelling in the train. He walked with him down the train. It is for the jury to say whether it was not his duty to keep him sufficiently away from the train to prevent him from doing mischief to himself or to anyone else by staggering against it, or in struggling to get into it, and the direction of the station master to "keep that man back" could not be withdrawn from the jury as material to the reasonableness of what the porter did in leaving him within reach of the train as it was starting.

As to the question of cause and effect which seems to have led Mr. Justice Wright to his conclusion, it appears to me that if the duty to use reasonable care to prevent injury from any particular cause is established, and if injury occurs, but happens in some most improbable way, or causes some most unlikely mischief, neither the particular manner of the injury, nor the particular extent of the mischief, can affect the question of the relation of cause and effect. But if the injury could not have reasonably

(1) 2 T. L. R. 180, 451.

been expected, or if the mischief was of a kind that could not reasonably be regarded as the consequence of what was done, it would be open to the jury to find that the relation of cause and effect does not exist. All this, and the cases and the law upon it, were discussed in *Sullivan* v. *Creed* (1), where though the defendant's act did not directly cause the accident, and notwithstanding that the chances against its happening as it did were almost incalculable, the defendant's negligence was held to be the cause of the injury, because it was a result which reasonably might or ought to have been anticipated as a consequence of his act.

This matter which caused the difficulty with Wright, J., did not receive any attention at the trial. It was not considered by the jury, because the risk which the Company undertook by accepting this man as a potential passenger was treated as in itself evidence of their liability, on the act of the ticket-checker alone, even without considering the action of the porter.

The measure of duty might, and in fact does, affect the assessment of damages. The measure of duty laid down at the trial was, in my opinion, too strict; and although I am of opinion that the case must go to the jury again, I cannot hold the defendants bound by a verdict based on an exaggerated standard of duty, and therefore possibly resulting in an exaggerated measure of damages. The case is complicated by other circumstances. The injury occurred in March; the trial took place in July. It was opened here as a case in which the plaintiff had lost his eye. As a matter of fact the vision of both eyes remains, although the sight of one has been seriously affected. It was stated at the time that he suffered no pain, and that the sight of the injured eye was then improving. The amount of the damages—£850—is *prima facie* very large. The danger of sympathetic injury to the remaining eye has been much pressed as justifying the damages, but one of the medical witnesses qualified this risk by the chance that some glass might have remained in the eye. The amount given challenges careful consideration; and with respect to the grounds which I have mentioned, the experience of twelve months instead

(1) [1904] 2 I. R. 317.

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of four is now available to test the risk on which the damages were assessed at £850. If we judge by our own experience, it is remarkable what a number of people have shared the misfortune of Hannibal, Nelson, and Gambetta; how many have but one eye, and how many more have only one useful eye? In how many cases has injury to one eye afterwards caused the loss of the other? But if the defendants are allowed the second trial which they ask, the additional expense must not diminish the plaintiff's compensation if he ultimately succeeds; and the costs of both trials, and of the new trial motion, must abide the result of the action. It has been said here that the damages were increased by the unpopularity of the Great Northern Railway Company in Derry. I do not believe that the jury acted from such a motive, and if the allegation was true, how do the defendants explain their entrusting the case to a common jury?

In my opinion the verdict ought not to stand, not on the amount of damages alone, but because the measure of duty and responsibility laid down as against the defendants, and the standard of duty applied to the conduct of their servants, the ticket-checker and porter, were incorrect, and may have affected the amount of damages. Accordingly, I am of opinion that the appeal should be allowed and a new trial directed. The appellant should have his costs of this appeal against the defendants; and the costs of the previous trial and of the motion in the King's Bench Division should be costs in the action.

WALKER, L.J.:—

The result of the discussion before us will be that there will be a new trial, and I myself do not regret that, because the damages appear to me unduly large; but I am precluded from making that a ground of decision, inasmuch as such an objection has not been discussed either in the King's Bench or here. But, speaking for myself, I do not see my way to interfere with the verdict; none of us think it could be entered for the defendants, and that was really the object of the defendants' application.

The facts are either all admitted or must be applied on findings of the jury, which certainly had evidence to support them.

Farry was seen outside the station in such an intoxicated

condition that he was supported by two friends, and was at one time leaning up against a wall or house.

It is found by the jury that he was let in by the defendants' servant, though he was obviously drunk—in other words, that White should have seen he was drunk, and that is proved abundantly by this, that the station-master said he was drunk, and so did the porter. Then we have him on the platform, and the by-law comes in, "Any one found on the Company's premises in a state of intoxication shall be subject to a penalty, and shall immediately, or if a passenger, at the first opportunity, be removed from the Company's premises." In many cases the Company may not be able to remove him without incurring risk to themselves or other passengers; but if they choose to allow him to remain, I think they take any peril involved in leaving him there with its natural consequences, and *a fortiori* they take the peril if, as was done here, instead of removing him, they, by their porter, help him to a carriage to be conveyed.

Then this drunken man makes for a first-class compartment. The station-master, seeing he was drunk, shouts to the porter, "Keep that man back." If that means do not let that man into the train, which it would be in the favour of the station-master to assume, it is exactly what the porter did not do. On the contrary, he marched him along the train, away from the exit, keeping between him and the carriages, and then the jury have found that he did this trying to get him into a third-class compartment.

M'Manus says the porter hesitated opposite the carriage the plaintiff was in, and the inference M'Manus drew was that he was about to put him in there. However, the jury have only found that the porter (knowing Farry was drunk) was trying to get him into a third-class compartment. The question put as to this, coupled with the alternative also put but not answered, assumes it would be an act of negligence on the porter to put him into a third-class compartment, instead of keeping him away, as Irvine shouted, or removing him from the platform, as the by-law directed.

Then the drunken man waves his arm and strikes the glass.

The defendants asked to have submitted to the jury the question whether the breaking of the window was the reasonable result of the action of the porter, and the jury say, "yes," carrying by their

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finding that it was conduct in a drunken man which the defendants' servant might reasonably have foreseen or reasonably anticipated—the vagaries of a drunken man just as the carelessness of a boy, according to the principle we applied in *Sullivan* v. *Creed* (1). The jury seemed to have treated the act as not deliberate. Speaking for myself, I cannot attribute deliberation to a drunken man in the sense that I would excuse the acts as if he was otherwise than drunk.

It is true the jury have not found either specific negligence in the porter, nor whether the act was deliberate or accidental; but they have found a drunken man did it, and the Judge was not asked to put any additional question, save the question to which he yielded.

I think it must be inferred that they intended to find the porter's acts—on their findings at least—continued the chain of causation commenced by his being allowed on the platform, and they wound up by finding that the accident was due to the negligence of the defendant Company in allowing a drunken man on the platform. If the only findings had been 1, 2, 3, 4, and 9, I should agree to have the verdict set aside, and a new trial had; but I think the 5th and 8th along with them are sufficient to support the plaintiff's verdict, and I, therefore, agree with the view expressed in Mr. Justice Gibson's judgment in the Court below.

Mr. Justice Wright arrives at the same conclusions of fact as I do, but he is unable to connect the negligence with the accident. He says:—"It was a wholly unexpected casualty, not naturally or directly flowing from the original wrongful act of the Company's servant, nor likely to arise from it. It was the result of an ebullition of temper, unexpected and unforeseen, and which could not reasonably have been foreseen." Well, upon the other conclusions of fact, I am unable to say the breaking of a window by a drunken man, just as falling against and injuring a woman on the platform, might not reasonably be anticipated as much as the gun accident in *Sullivan* v. *Creed* (1) and numerous cases referred to in the judgments in that case, or the falling against and upsetting a fellow-passenger in *Murgatroyd's Case* (2).

(1) [1904] 2 I. R. 317, 335. (2) 2 T L. R. 180, 451.

HOLMES, L. J. :—

The plaintiff, on the 29th March last, was travelling from Londonderry to Fintona by the train which reaches Omagh shortly after noon, and was sitting in a third-class carriage, facing the engine in the corner next the platform. About the time of the arrival of the train at Omagh a man named Farry entered the station in a state of intoxication, which affected his gait and power of locomotion to such an extent as to be noticed by any one seeing him. He walked unaided from the booking office to the platform, through a door at which stood a ticket-checker, by whom he was recognised as he passed. The train at the time was about to start, and there were few persons, if any, on the premises except officers of the Company. Farry approached a first-class carriage, apparently with the purpose of entering it, when he was observed by the station-master, who, either because he was intoxicated, or because he was not entitled to travel in a first-class carriage, or because he was too late, told a porter to keep him back. The porter caught him by the arm, and walked with him towards the end of the train. When they came close to the carriage in which the plaintiff was seated, they paused for a moment, during which Farry broke the window beside the plaintiff, causing a small portion of glass to lodge in his eye, and thus inflicting the injury for which the action was brought.

There are only two material points as to which there is a difference between the witnesses. The plaintiff's evidence goes to show that the porter placed his right arm through Farry's left arm, thus interposing his own body between Farry and the train. The porter, on the other hand, swears that his left arm was in Farry's right, and that Farry was next the carriage. Furthermore, the plaintiff's only witness on this branch of the case says :— "I saw the drunken man draw his fist and break the window." The porter's evidence is that while Farry struggled, he threw back his left arm and struck the pane of glass, indicating, as it seems to me, the absence of intention. The foregoing are the facts material to the consideration of a somewhat novel question, the responsibility of railway companies for the acts of drunken men who have gained admittance to their premises.

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That judicial authority on this point is scanty does not arise from any exceptional sobriety on the part of railway travellers. The result of my own observation is that more cases of intoxication are to be seen on railway platforms than in any other public or semi-public places of similar extent; and I believe my experience in this respect is not unique. Perhaps one reason for cases of this kind coming so rarely before legal tribunals is, that drunken men, although often annoying and unpleasant, are rarely the cause of actionable wrongs to people about them. In the present case, however, there is no doubt that Farry himself was liable for the injury to the plaintiff's eye, and the question is whether the issues found by the jury are sufficient to attach liability to the defendant Company. The first four questions put to them, relating as they do to Farry passing the ticket-checker, seem to be framed on the assumption that if a drunken man is permitted to enter a railway platform the Company is thereby made responsible for every act of his while there. I think that this is not the law. There are various stages of intoxication; and in any stage different men are affected in different ways. Drink makes some people cross and others good-humoured. It occasionally causes violent excitement; more frequently mere dulness and stupidity. A drunken man is often accompanied by a sober friend well able to take care of him. A railway station may be so crowded as to make his semi-helplessness, or even his rolling gait, a source of peril to others; or it may be so deserted as to remove apprehension of danger. These and all other surrounding circumstances must be taken into account in considering whether the admittance into railway premises of a person in a state of intoxication is an act of negligence by the Company; nor can I regard the by-law, that declares that drunken men shall be excluded, as conclusive. The by-laws of a railway Company are self-imposed rules, made for their own protection, for the guidance of their servants, and for the convenience of the travelling public; but they cannot be taken as the measure of their duty towards individual members of the public on every occasion to which they are applicable. It is unnecessary for me to offer an opinion as to whether allowing Farry to go on the platform was evidence of negligence in the abstract; inasmuch as I am satisfied that it did not lead to the plaintiff's mishap in

the sense in which cause and effect are understood in actions such as this. If Farry had not been interfered with, he would have gone into a first-class carriage, and the plaintiff would never have heard of his presence. The chain of events that ended in the breaking of the carriage window began when the station-master interposed.

Therefore, I hold that questions 1, 2, 3, 4, and 9, were irrelevant, and cannot be relied on to support the judgment. Questions 5, 6, 7, and 8 relate to what happened after Farry was taken charge of by the porter; but, unfortunately, they also seem to have been framed on an assumption that cannot be supported; namely, that the mere fact of the porter trying to put him into a third-class carriage was in itself an act of negligence. That there was this assumption appears clearly, I think, from the hypothesis that introduces questions 7 and 8, respectively. To put a drunken man into a third-class carriage may or may not be an act of negligence according to the circumstances of the case; but the intention to do so, not carried out, is neither negligence nor evidence of negligence. The critical point seems to me to be whether reasonable precautions were taken by the Company's servants to prevent Farry from injuring passengers in the train after he had been taken charge of by the porter. If this were answered in the negative, and the jury found that the breaking of the window was the reasonable consequence of the want of such precautions, the result would be a verdict for the plaintiff. I am always reluctant to send a case to a second trial, and especially so where the probabilities are that the jury would have come to the same conclusion if the true issue had been put to them. But the questions involved in this action are of great importance to both railway companies and the travelling public; and I fear that if we were to give judgment upon the present findings, it would amount to affirming one or other of two propositions of which neither, in my opinion, is law. Therefore, while I concur in setting aside the judgment for the defendants, I agree with Fitz Gibbon, L.J., that there should be a new trial. I observe that Mr. Justice Kenny, who tried the case, seems to have been dissatisfied with the finding that the breaking of the window was the reasonable result of the action of the porter. As this was a pure jury question, their conclusion

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upon it could not have been got rid of if there had been no other objection to the verdict. But I am not sorry that this matter as well as the assessment of damages will be again submitted to a jury. A material element in determining it will be whether the jury will accept the account of the transaction as given by Mr. Hughes or by the porter whose version seems to me to be much more favourable to the plaintiff's case than that of his own witness. The damages awarded are far in excess of the sum recovered in any action similar in its circumstances to the present within my experience. The plaintiff was unable to work for a month, but did not suffer pain. He seems to have been then able to pursue his usual avocations. The sight of the injured eye has been permanently impaired, but was improving at the time of the trial; and as all the glass was extracted and the wound had healed, injury to the other eye from sympathy is a very remote contingency.

Solicitor for the plaintiff: *William Foster.*
Solicitors for the defendants: *Crawford & Lockhart.*

G. Y. D.

CLEMENTS *v.* THE COUNTY COUNCIL OF TYRONE (1).

(1904. No. 6932.)

K. B. Div. 1904. Nov. 29, 30. Dec. 21.

Local government—County Council—Repair of guard walls—Obstruction of highway—Independent contractor—Casual or collateral negligence—Liability of County Council for—Grand Jury Act (6 *&* 7 *Wm.* 4, *c.* 116), *ss.* 50 56 *Local Government Act*, 1898 (61 *&* 62 *Vict. c.* 37), *ss.* 4, 72—*Procedure of Councils Order*, 30*th January*, 1899, *Articles* 19, 20, 22, 23—*Local Government Board* (*Ireland*) *Provisional Order Confirmation Act*, 1901 (1 *Edw.* 7, *c.* cxli), *s.* 15.

The County Council of T. employed an independent contractor to take down and rebuild the damaged portions of the guard-wall of a public road. The public road was 20 feet 9 inches in breadth, was bounded on the other side also by a wall, and had no grass fringes on either side between the carriage way and its boundary walls. The land at the other side of the damaged wall being private property, there was nowhere but the public road itself on which to place debris from the wall and materials for its reconstruction. No provisions were inserted in the contract obliging the contractor to fence, protect, or light any materials which he might, in the course of the work, be obliged to place on the road; neither did the County Council take any steps to ensure that such precautions would be adopted. The contractor placed a heap of debris and materials on the road, from 2 to 2½ feet high, extending out 8 feet from the wall under repair, and, in fact, covering the wheel track on one side. He left the heap in this position at night, without any lights, fencing, or protection of any kind. The obstruction caused a school cart, on which the plaintiff was travelling after dark, to upset, and the plaintiff was thrown out and injured:—

Held, that the County Council were liable in an action for negligence.

Per Palles, C.B., that where a body, having lawful authority, authorises an interference with a public road, or authorises works which, in the natural course of things, will result in such an interference, there is a duty cast upon that body to use due care to prevent danger to the public using the road being caused by the execution of the works authorised; that that duty extends to seeing that the workmen actively engaged are careful; and that such body cannot relieve itself of the obligation by delegating it to another, who fails to perform it.

Held, also, that upon the construction of the sections of the Local Government Act, 1898, constituting and prescribing the powers of County Councils, coupled with section 15 of the Provisional Order Confirmation Act, 1901, whereby County Councils are to be at liberty to arrange otherwise than by contract for work of this description, the duty to perform the work is imposed

(1) Before PALLES, C.B., and ANDREWS and JOHNSON, JJ.

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on County Councils, together with the corresponding liability to pay out of the county funds the amount recovered in an action for breach of such duty.

The positions of Grand Juries and County Councils in this respect contrasted and defined.

But *quære*, whether the same duty and liability arise in relation to works which must be executed by contract.

MOTION to set aside the verdict and judgment entered for the plaintiff at the trial, and to have a verdict and judgment entered for the defendants.

The County Council of Tyrone, being the highway authority for the county, had under its control the road from Beragh to Fintona, and had contracted for general road repairs in respect of this road with a man named James M'Crory. At a distance of about seven furlongs from Beragh, the road takes a slight rise and curve and passes through a cutting. At one side of the road there is a wall, 9 feet 7 inches high, with a garden on the other side and a hedge on top. On the other side of the road there is a wall 4 feet high. There are no fringes of grass on either side, and the road at the point in question is 20 feet 9 inches in breadth. Portions of the 9 feet 7-inch wall having fallen, the County Council, on the 6th November, 1903, entered into a contract with Edward Boyle to execute the necessary repairs. The text of the contract was as follows :—

CONTRACT OF EDWARD BOYLE, CLOGHERNEY, BERAGH,

To repair, where necessary, the broken down parts of a road wall on James M'Crory's contract, from Beragh to Fintona, between Beragh and Fintona, in the townland of Beragh, at Caldwell's ; special specification.

District of Omagh. 4th Quarter, 1903-4.

Specification of works to be done in executing, altering, or repairing the following :—To repair, where necessary, the broken down parts of the wall on James M'Crory's contract, in the townland of Beragh, at Caldwell's.

Description of the work to be done.—The damaged part of the wall to be taken down and rebuilt in lime mortar. Foundations for new work to be sunk to a depth of 2 feet below the level of the road surface. Foundations to be 3 feet wide, and the new wall to be 2 feet 6 inches thick at the bottom, battered on face, plumb on the back, and to finish 2 feet thick at level of ground on field side. Scotch coping of large thorough stones, 12 inches high, laid across wall, and projecting two inches over the face thereof ; the stones set close together on edge in cement mortar, and well wedged. The wall to be carried

to height of wall adjoining. Cement mortar, to consist of one part good Portland cement mortar to three parts clean sand.

Foundations.—Excavations are to be made a sufficient depth to obtain a solid stratum of either rock, gravel, or hard clay, to be levelled evenly to receive the lower courses of the masonry.

Masonry.—The masonry to consist of large flat-bedded stones, to be carried up in regular courses of 14 inches in height, well bonded, each stone to be laid on its natural bed, firmly set in a swimming bed of mortar, the interior carefully filled with spawls and mortar, the exterior angles to be carried up with dressed quoins of the heights of the corresponding courses, laid header and stretcher, and the interior angles to be bonded at each alternate course, the joints to be neatly cleaned and pointed.

Mortar.—The mortar to consist of one part well-burnt lime, fresh from the kiln, and two parts clean sharp sand, free from clay or any extraneous matter, well tempered and mixed before being used.

Materials.—The contractor to provide himself with all implements and materials necessary for the execution of the work, and with a copy of this specification, and to produce it to the surveyor or his assistant when required.

The whole of the works to be executed in a neat, permanent, and workmanlike manner in every particular necessary for a substantial and complete structure, according to the true intent and meaning of this specification, and to the satisfaction of the county surveyor, on or before the 1st day of May, 1904.

Should any dispute arise as to the meaning or performance of this contract, the county surveyor's decision thereon is to be final and binding on all parties concerned. The County Council shall have power to rescind the contract at their absolute discretion at any quarterly meeting, either at once or at any future date.

T. J. LYNAM, *County Surveyor, Tyrone.*
EDWARD BOYLE, *Contractor.*

Boyle was working at the repairs on the 16th March, 1904, and in the course of his operations placed a heap of rubbish, stones, gravel, and clay, on the road. This heap extended 8 feet from the wall under repair, and was from 2 feet to 2½ feet high. He went away for the night, leaving the heap as it was, and took no precautions by lighting, or otherwise, to warn persons travelling on the road of the danger.

Robert Orr Clements, the plaintiff, who was a farmer residing at Greenmount Lodge, Seskinore, was driving his own school cart and pony from Beragh towards his home on the night of the 16th March, 1904, and was passing the spot in question at about 8.30 p.m. He was accompanied by two men named Roulston and Lennon. He had two lamps burning, and was driving in the

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centre of the road. Having walked up the hill, he struck a trot, and after he had gone two or three perches he saw "a shine of white lime" on his right. He was thrown out of the cart on to the left-hand side of the road, and when picked up by his companions was unconscious and severely injured. Observations of the track of the wheel were taken by a constabulary sergeant the next day. The wheel was on the ordinary road track, and it passed over the heap of rubbish at a point 7½ feet distant from the wall. Persons who had passed the spot at 3 p.m. and 6 p.m. on the same day were examined to prove that the obstruction was on the road when they passed. Boyle was afterwards prosecuted by the police at Petty Sessions and fined.

Under these circumstances the plaintiff sued the County Council for negligence, and the case was tried at Omagh Summer Assize, 1904, before Lord Justice Walker and a special jury. It was not contended that the plaintiff was in any way negligent, nor were the wrongfulness and carelessness of the act questioned. The facts above stated having been given in evidence, counsel for the defendants asked for a direction on the ground that the County Council were not liable for the illegal act of Boyle, the contractor, committed by him in violation of his duty; it was the same as if any third party had left some obstruction on the road, and it was not a case of non-repair of the road.

The learned Lord Justice refused to direct. The following were the questions left by him to the jury, and their answers:—

1. Did the defendants, by the contractor, or Boyle, or others acting for them, place a heap of stones and clay on the roadway, and leave the same there at night, unlighted and unguarded? *Answer*—Yes.

2. Was the said heap of stones and clay dangerous to persons lawfully using the roadway at night, and a nuisance? *Answer*—Yes.

3. Were the injuries to the plaintiff caused by said heap of stones and clay? *Answer*—Yes.

4. If jury find for the plaintiff, assess damages. Damages, £200.

The grounds now relied upon in the defendants' motion to set aside the verdict and judgment were, that there was no evidence

to support the verdict; that there was misdirection on the part of the learned Lord Justice in directing the jury that the defendants were in law responsible for the acts of their contractor, Boyle, in that, on the evidence, he should have directed a verdict for the defendants.

Wylie, K.C., and *Patchell, K.C.* (with them *Gaussen*), for the defendants:—

The plaintiff bases his action against the County Council upon acts of omission, viz., omission to remove the stones, and omission to light or protect the stones when left on the road. These were acts of Boyle, an independent contractor, and constituted a criminal offence on his part for which he was afterwards prosecuted and fined. His negligence was not negligence in the course of the work he was employed to perform, but casual or collateral negligence for which the defendants are not responsible. There have been several recent cases in which corporations or public authorities who were entitled by statute to obstruct the public highway have been held liable for the negligence of the contractors to whom they delegated the work: *e.g.*, *Hardaker* v. *Idle District Council* (1); *Penny* v. *Wimbledon Urban District Council* (2); and *Holliday* v. *National Telephone Company* (3). From all of those cases this case is distinguishable in the all-important particular that in them the negligence relied on was negligence in the course of the very act authorised to be done under the contract. Here it was different. What Boyle was authorised to do under the contract was to take down the damaged portion of the wall, and to repair and rebuild it.

He was never expressly authorised to place rubbish or stones on the road, and even if, by implication, he was so authorised, he was certainly never authorised to place stones in the middle of the road. Everyone is familiar with the spectacle of heaps of stones for metalling purposes lying unlighted and unprotected at the sides of roads; but could a County Council, which employed a contractor to place the heaps on the side of the road to await their use as road metal, be held to have authorised the act of the contractor if in fact he placed the heaps in the middle of the road?

(1) [1896] 1 Q. B. 335. (2) [1899] 2 Q. B. 72. (3) *Ibid.* 392.

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Omission to light or protect cannot be relied upon as negligence for which the County Council was responsible, unless the act authorised was one calculated to lead to danger to the public. The danger to the public consisted in placing the heap in the middle of the road. Therefore, there being no authorisation by the County Council of the dangerous act, there was no obligation on them to enforce the proper precautions against the consequence of that act. It is plain that the County Council never contemplated, and no County Council could reasonably contemplate, that the contractor would place the stones in the middle of the road.

Under sections 4 and 72 of the Local Government Act, 1898, the powers and duties of the Grand Juries are transferred to the County Council. In respect of roads these powers and duties are those prescribed by sections 50-56 of the Grand Jury Act, 6 & 7 Wm. 4, c. 116. We submit that upon the true construction of these sections, the County Councils are only subject to the same liabilities as the Grand Juries, and on this ground there is no liability here: *Harbinson* v. *County Armagh County Council* (1); *Campbell* v. *Tate* (2); *Rennick* v. *County Council of Wexford* (3); *Cowley* v. *Newmarket Local Board* (4); *M'Mahon* v. *Carroll* (5). Although incorporation rendered County Councils liable to be sued, it did not increase their liabilities over and above the liabilities of the Grand Juries. They are the old Grand Juries under another name.

The duty of the County Council was restricted to entering into a proper contract: Procedure of Council Order, January 30th, 1899, Articles 19, 20, 22, and 23. Having done so, their obligation ceased until there was some default on the part of the contractor. Where a statutory duty is imposed and there is a statutory power to delegate that duty, there is no liability on the part of the delegating body for the neglect of the person to whom the duty was delegated: *Howitt* v. *Nottingham and District Tramway Company, Limited* (6); *Alldred* v. *West Metropolitan Tramway Company* (7).

(1) [1902] 2 I. R. 538.
(2) I. R. 6 C. L. 193.
(3) 1 New Ir. Jur. 183.
(4) [1892] A. C. 345.
(5) Brett's Grand Jury Law, 23.
(6) 12 Q. B. D. 16.
(7) [1891] 2 Q. B. 398.

[The following cases were also referred to :—*Peachy* v. *Rowland* (1) ; *Foreman* v. *Mayor of Canterbury* (2) ; *Bower* v. *Peat* (3) ; *Duncan* v. *Findlater* (4) ; *Holliday* v. *St. Leonards Shoreditch* (5).]

Henry, K.C., and *Horner, K.C.* (with them *Muldoon*), for the plaintiff :—

Owing to the physical formation of the road and its surroundings, the wall could not be pulled down, and materials could not be accumulated for rebuilding, without placing stones and materials on the road. It would be a trespass to place them on private property at the other side of the wall. It was therefore a reasonable and inevitable matter for the County Council to have in contemplation, when the contract was entered into, that the contractor would avail of the powers or privileges of his employers to obstruct the public road ; and they must be taken to have authorised such obstruction. The negligence complained of here was negligence in the course of the obstruction so authorised. It makes no difference that the precise act causing the injury was not authorised by the contract—the employer of the contractor is liable if it is a case in which the law casts upon the employer the duty of seeing that reasonable care and skill are exercised. In such a case the employer cannot get rid of responsibility by delegating the performance to a third person : *Hughes* v. *Percival* (6) ; see also *Westropp* v. *County Council of Clare* (7). There is nothing in the contract providing for the fencing, lighting, or protection of the portion of the road where the stones were to be deposited. In this sense the County Council are in default for not having entered into a proper contract—a contract in which all these precautions against danger to the public would be insisted on : *Pendlebury* v. *Greenhalgh* (8). In the latter case Lord Cairns, at p. 40, lays down that under somewhat similar circumstances, a defendant, as he could not carry out all the works he was bound to perform with his own hands, would not have been responsible if he had contracted in a proper manner with a third person to carry out the work with all its incidents. But, inasmuch

(1) 13 C. B. 182.
(2) L. R. 6 Q. B. 214.
(3) 1 Q. B. D. 321.
(4) 6 Cl. & F. 894.
(5) 11 C. B. (N. S.) 192.
(6) 8 A. C. 443.
(7) [1904] 2 I. R. 569.
(8) 1 Q. B. D. 36.

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as he did not contract for the performance of the work as a whole, but for part only, he was held liable. We rely strongly on *Hardaker* v. *Idle District Council* (1); *Penny* v. *Wimbledon Urban District Council* (2); and *Holliday* v. *National Telephone Company* (3), as carrying us the full length upon the question of casual or collateral negligence.

This is not a case in which the County Council were bound to delegate the work to a contractor. A mere resolution would have enabled them to do the work themselves; see Local Government Board (Ireland) Provisional Order Confirmation Act, 1901 (1 Edw. 7, c. cxli, s. 15). The exemption from liability enjoyed by the Grand Juries is not preserved to the County Councils.

[The following cases were also cited:—*Pitts* v. *Kingsbridge Highway Board* (4); *Sadler* v. *Henlock* (5); *Mersey Docks Trustees* v. *Gibbs* (6); *Peachy* v. *Rowland* (7).]

Patchell, K.C., in reply.

Dec. 21.

PALLES, C.B.:—

The question here is the liability of a County Council to damages for injuries sustained by the plaintiff, by the car, which he was driving at night along a public road, being overturned by a heap of stones and rubbish which had been left by one of the defendants' contractors on the public road unlighted.

The contract, which was to repair a wall, was one which the defendants had power to enter into under sect. 56 of the Grand Jury Act of 1836, as adapted under the Local Government Act. The wall stood at the side of a road, at a place where there were no green slips intervening between the wall and the metalled part of the road. The work contracted for involved the taking down of parts of the wall, of excavating foundations for the new or repaired wall, and probably of re-using in the repaired wall such of the stones taken down as were fit for such use. The ordinary mode of performing such a work in such a place involves the soil dug out of the excavations, the new materials intended to be used, and the

(1) [1896] 1 Q. B. 335.
(2) [1899] 2 Q. B. 72.
(3) *Ibid.* 392.
(4) 25 L. T. R. 195.
(5) 4 E. & B. 570.
(6) L. R. 1 H. L. 93.
(7) 13 C. B, 182.

old materials which had been taken out of the wall, being placed upon, and for some time remaining upon, the metalled road. Such a mode of performance is perfectly legal, provided the work is properly lighted at night and guarded, and, in my opinion, it was the mode which was authorised by the contract. However, unless so lighted and guarded, the work is dangerous to all using the road at night.

Lord Justice Walker, at the trial, held the defendants liable, and the case comes before us upon a motion to change the verdict directed by him.

The case is, undoubtedly, an important one; and in one respect is, I think, one of first impression. To determine it, we must keep separate two questions. 1. Would the defendants have been liable had they been a private person or a public Company (of the class within the decision in *Mersey Docks Trustees* v. *Gibbs* (1)), who was charged with the obligation to repair? 2. If so, is there anything in the nature of a County Council, or in its powers, which differentiates its liability, in respect of such a matter as that before us, from that of such private person or public company? I shall discuss each of these questions separately.

I desire, then, in the first instance, to distinguish between the position of a person bound to repair, and that of an ordinary member of the public, as, in my opinion, this lies at the root of the matter. A member of the public has not, without statutable authority, any right to place any obstruction upon a public road. If he does so, he is guilty of an illegal—indeed of a criminal—act. On the other hand, a person under an obligation to repair is entitled to place obstructions upon the road for the purposes of repair, but subject to the essential condition that due care is used that such obstructions shall not be a source of public danger. This duty appears to me to be due by everyone who lawfully places an obstruction on a public road, whether the person who so places it does it under an obligation to repair, or under statutable authority to do it, as incidental to some other work. Such a duty is one peculiarly that of the person who lawfully places or authorises the placing of the obstruction, because the preservation of the public

(1) L. R. 1 H. L. 93.

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from danger is paramount to the right of placing obstructions upon the public road, and consequently is a condition upon which the persons entrusted by the common law or by statute with the right of interfering with the public right of passage obtain that right of interference. It follows that they cannot excuse the non-performance of this duty, by delegating its performance to another who has neglected it. The cases on this subject are uniform, from the decision in 1864 of the Exchequer Chamber in *Gray* v. *Pullen* (1). In *Dalton* v. *Angus* (2), Lord Blackburn states the principle to be one which has been well settled. He says:—

> "A person causing something to be done, the doing of which casts upon him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed, by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty, and stipulate for an indemnity from him if it is not performed, but he cannot relieve himself from liability to those injured by the failure to perform it."

In reference to the application of this principle to such a case as that before us—that of an obstruction placed upon the public road by authorities lawfully entitled to interfere with the road—there are three recent cases, all in the Court of Appeal in England, and all relating to corporate bodies, authorised to do the acts in the execution of which their contractors were engaged when the injuries complained of were occasioned. I refer to *Hardaker* v. *Idle District Council* (3); *Penny* v. *Wimbledon Urban Council* (4); and *Holliday* v. *National Telephone Co.* (5).

In the first of these cases the District Council employed a contractor to construct a sewer for them, which they had a statutory duty to construct. In consequence of the negligence of the contractor in carrying out the work, a gas main was broken, and gas escaped from it into the house in which the plaintiffs resided, exploded there, and injured one of them. The question was as to the liability of the defendants, as distinguished from that of the contractor. It was held that the defendants owed a duty to the

(1) 5 B. & S. 970.
(2) 6 A. C. 740, at p. 829.
(3) [1896] 1 Q. B. 335.
(4) [1899] 2 Q. B. 72.
(5) *Ibid.* 392.

public so to construct the sewer as not to injure the gas-main, that they had been guilty of a breach of this duty; and that although they had delegated the performance of this duty to the contractor, they were responsible to the plaintiffs for the breach. Lindley, L.J., says (p. 340):—

> "The powers conferred by the Public Health Act, 1875, on the district council can only be exercised by some person or persons acting under their authority. Those persons may be servants of the council or they may not. The council are not bound in point of law to do the work themselves, *i.e.*, by servants of their own. There is nothing to prevent them from employing a contractor to do their work for them. But the *council cannot, by employing a contractor, get rid of their own duty* to other people, whatever that duty may be. If the contractor performs their duty for them, it is performed by them through him, and they are not responsible for anything more. . . . If, on the other hand, their contractor fails to do what it is their duty to do, or get done, their duty is not performed, and they are responsible accordingly."

In the same case, Rigby, L.J., puts it thus (p. 351):—

> "I will assume in the first instance that he (Thornton) was an independent contractor. His interference with the street would have been illegal, but for the fact that he was acting as the agent and delegate of the district council, who having power to do the work under sect. 150 of the Public Health Act, 1875, and other statutory provisions, employed Thornton to do it for them, so that he acted by virtue of their authority, and their authority only. If they had done the work by the hands of their servants, it cannot be doubted that it would have been their duty to use all reasonable skill and care to prevent damage to any persons arising from their operations. . . . Notwithstanding a great conflict of judicial opinion, many *dicta*, and some decisions to the contrary, I consider it has always been on the balance of authority, and is now clearly recognised as the law, that *no one can get rid of such a duty by imposing it upon an independent contractor.*"

Penny v. *Wimbledon Urban District Council* (1) was a case like the present, in which the injuries sued for were caused by the plaintiff, after dark, falling over a heap of soil which had

(1) [1899] 2 Q. B. 72.

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been negligently left by the defendants' contractor unlighted on a road. Vaughan Williams, L.J., said (p. 77):—

> "As to the question of the liability of the council for the acts of the contractor, there is hardly any subject on which the course of the authorities, down to the recent case of *Hardaker* v. *Idle District Council* ([1896] 1 Q. B. 335), has been so uniform and clear. In cases like the present, where a statutory authority has power to do something to a road which involves stopping it, or . . . which will make it dangerous while it is being done, there is a duty cast upon them to take care that the Queen's subjects are not injured by any carelessness in the doing of that which has to be done."

So, too, in *Holliday* v. *National Telephone Co.* (1), the Earl of Halsbury says (p. 398):—

> "There was here an interference with a public highway, which would have been unlawful but for the fact that it was authorised by the proper authority. The telephone *company so authorised to interfere with a public highway are*, in my opinion, *bound*, whether *they* do the *work* themselves or *by a contractor*, *to take care that the public* lawfully using the highway are *protected against* any act of *negligence* by *a person acting for them* in the execution of the works."

I am quite satisfied to rest my judgment, on the first of the questions I have mentioned, upon this principle. The cases, however, to which I have referred lay down a principle even broader, which would sustain the verdict here if the conclusion were come to that the contract of the defendants did not authorise Boyle, the contractor, to place the materials and rubbish on the road, but required (as has been argued) that the contents of the wall, when taken out, should be removed directly into a cart and drawn away, and that the new materials should be lifted from the cart in which they had been brought to their site in the wall. Although I entirely reject the contention that this was the true nature of the authority, I shall for the moment assume that it was. I am of opinion that, even in that case, the defendants would be liable. That would have been a contract, the terms of which anyone having any knowledge whatever of the mode in which road contractors ordinarily work would know, would not be adhered to. Negligence

(1) [1899] 2 Q. B. 392.

in not adhering to it, by placing rubbish and materials on the road, ought to have been foreseen, and such negligence, if accompanied by the further negligence of not lighting at night, would cause danger. Does a duty to the public arise in such a case? The authorities I have already referred to decide that there does. A. L. Smith, L.J., in the *Idle Case* (1), traces this duty, from *Bower* v. *Peate* (2), through *Dalton* v. *Angus* (3), and the criticism of Lord Blackburn in *Hughes* v. *Percival* (4), and arrives at the conclusion that where one orders work to be executed from which, in the natural course of things, injurious consequences to another must be expected to arise, unless means are adopted by which such consequences may be prevented, he is bound to see to the doing of that which is necessary to prevent the mischief; and he there applied that principle to a case in which "the natural course of things" from which injury might be expected, was the *negligent* performance of the work contracted for—in that case the negligent breaking of the gas-main. The same learned Lord Justice bases his judgment in *Penny* v. *Wimbledon Urban District Council* (5) upon the same principle, and states his entire approval of the following passage from the summing-up of Bruce, J.:—

> "The principle of the decision [*i.e.*, *Pickard* v. *Smith* (10 C. B., N.S. 470)], I think, is this, that when a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and that, if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor."

This principle he there applies to the neglect of the precaution of lighting, and would be equally applicable here, to taking care that obstructions were either not left on the road, or were lighted.

Romer, L.J., bases his judgment on the same principle. He says (page 78):—

> "When a person, through a contractor, does work which from its nature is likely to cause danger to others, there is a duty on his

(1) [1896] 1 Q. B. 335.
(2) 1 Q. B. D. 321.
(3) 6 App. Cas. 740.
(4) 8 App. Cas. 443.
(5) [1899] 2 Q. B. 72, at p. 76.

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part to take all reasonable precautions against such danger, and he does not escape from liability for the discharge of that duty if the latter does not take these precautions. . . . The work done in this case was the making up of a road frequented by the public. From the nature of this work danger was likely to arise to the public accustomed to use the highway by the alteration of level, and by the heaps of soil and holes almost inevitable in work of the kind. The usual precaution to take in such a case is to put up lights or other warnings to prevent persons falling into the holes or over the heaps of soil. In my opinion, it is unreasonable not to take these precautions."

In *Holliday* v. *National Telephone Company* (1) the way in which the injury happened was much more remote than it is in the present case. There the defendants, a Company who had power to lay telephone wires along a street, passed the wires through tubes which they laid in a trench under the level of the pavement. They contracted with a plumber to connect these tubes at the joints with lead and solder. In order to make the connexions between the tubes, it was necessary to obtain a flare from a lamp, which could not be done without the application of heat to the lamp. The lamp used was provided with a safety-valve. The plumber, for the purpose of producing the necessary flare, dipped the lamp into a cauldron of molten solder, which for the purpose of the work was placed over a fire on the footway, and was unprotected by any screen or tent. Dipping the lamp into the solder would have been the proper and usual mode of obtaining the flare, had the lamp been in good order. The safety-valve of the lamp not being in working order, as the plumber ought to have known, the lamp exploded, with the result that the plaintiff, who was passing along the highway, was splashed by the molten solder, and thereby injured. I have already referred to a passage from Lord Halsbury's judgment, which is based upon the work being an interference with a public highway; but in another portion of the judgment he treats the matter as if the works were not on, but in proximity to the road. He says (page 399):—

"Therefore, works were being executed in proximity to a highway, in which, in the ordinary course of things, an explosion might take place.

(1) [1899] 2 Q. B. 392.

It appears to me that the telephone *company, by whose authority* alone *these works were done*, were, whether the works were done by the company's servants or *by a contractor, under an obligation* to the public to *take care* that persons passing along the highway were *not injured* by the *negligent performance* of the work."

A. L. Smith, L.J. (page 400), reverts to the principle on which he had decided the two previous cases :—

"In my opinion, since the decision of the House of Lords in *Hughes* v. *Percival* (8 A. C. 443) and that of the Privy Council in *Black* v. *Christchurch Finance Co.* ([1894] A. C. 48), it is very difficult for a person who is engaged in the execution of dangerous works *near* a highway to avoid liability by saying that he has employed an independent contractor, because it is the duty of a person who is causing such works to be executed to see that they are properly carried out, so as not to occasion any damage to persons passing by on the highway. I do not agree that this was a case of mere casual and collateral negligence within the meaning of that term, for it was negligence in the very act which Highmore was engaged to perform."

To these cases may be added that of "*The Snark*" (1), which arose upon the liability of an employer for the negligence of an independent contractor who had been employed to conduct the salvage operations necessary to raise a sunken vessel in the Thames. The contractor placed a guard vessel, with lights on it, to mark the place of the wreck; but negligently allowed it to get out of position, so that the plaintiff's vessel struck against the wreck and was injured. It was argued that the work itself, apart from the negligence, was not dangerous; but the Court of Appeal (Lindley, Rigby, and Collins, L.JJ.) held that the case was governed by *Penny* v. *The Wimbledon Urban Council* (2), and held the employer of the contractor liable. I refer to this case as if the real contract were that contended for by the defendants; it is very closely in point. There are many other cases to the same effect, from 1861, when *Pickard* v. *Smith* (3) was decided, down to the present time, to which I do not intend to refer; nor is it necessary to state the facts of *Hughes* v. *Percival* (4) and *Black* v. *Christchurch Finance Company* (5), because

(1) [1900] P. D. 105.
(2) [1892] 2 Q. B. 72.
(3) 10 C. B. (N. S.) 470.
(4) 8 App. Cas. 443.
(5) [1894] A. C. 48.

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I think I have sufficiently shown three things, viz.—1, that where a person having lawful authority authorises an interference with a public road, or works which, in the natural course of things, will result in such an interference, there is a duty cast upon him to use due care to prevent danger to the public using the road being caused by the mode of execution of the works authorised; 2, that that duty extends to seeing that the workmen actually engaged are careful; and 3, that it is impossible for him to relieve himself of that obligation by delegating it to another who fails to perform it.

I proceed to consider the second question, which is the part of the case that is new: that is, assuming that there would have been a duty on a private person bound to repair a road, say, *ratione tenuræ*, or upon a trading company within the class described in *The Mersey Docks Trustees* v. *Gibbs* (1), similarly bound, is there any such duty on the present defendants? It is certainly an interesting and important question. Before discussing it, I desire, in the first instance, to say that *Rennick* v. *County Council of Wexford* (2), decided by Fitz Gibbon, L.J., on circuit, has, in my opinion, no application here. The contract there was one which had been entered into, not by the County Council, as is the contract here, but by the Grand Jury before the coming into operation of the Local Government Act; and I think it is clear that it was impossible to contend there that the liability created in the Grand Jury, by the execution of that contract, was increased merely by reason of its being transferred to a corporation. It would seem to me that the line of cases, from *M'Kinnon* v. *Penson* (3) to *Cowley* v. *Newmarket Local Board* (4), are conclusive on the point. I agree in all that the Lord Justice said in that case:—

> "I know no reason why a county surveyor, who had charge of a road, and neglected his duty, should not be held answerable in an action for damages for the consequences of his neglect. But I do not think any action would lie against the Grand Jury, for in such a case I hold that the action would not lie, not merely because the Grand Jury was not a Corporation, but also because the limits of *their* statutory powers and duties show that their responsibility does not extend to

(1) L. R. 1 H. L. 93.
(2) 1 New Ir. Jur. 183.
(3) 8 Exch. 319; 9 Exch. 609.
(4) [1892] A. C. 345.

making them answerable in damages as guarantors that contractors, or even county surveyors, bound to repair roads, will always keep roads safe."

These observations, though applicable to the case then before him, do not touch the question here, where the contract was entered into with the County Council after the Local Government Act had come into operation. It may be convenient that I should here mention that there is a difference between the Orders of the Local Government Board upon which this case was argued, and those which actually apply to the case. We thought it right to ask the Local Government Board to furnish us with all Orders which they had issued amending the Procedure of Councils Order of 1899; and it is fortunate that we did so, because Article 22 of that Procedure Order, as altered under the authority of Parliament, is wholly different from the order as it originally stood, and upon which the case was argued. Article 22, as it originally stood, was as follows:—

> "All public works executed in pursuance of a proposal of the rural district council, or proposal committee, approved under this order by the county council, shall be executed by contract, except in cases where, under the provisions of any Act or this order, works are given into the charge of, or can be executed by, the county surveyor."

That is practically the same as sect. 56 of the Grand Jury Act. But since that Order was made, the following words have been added, and the addition has been confirmed by Act of Parliament (1 Edw. 7, c. cxli., sch. s. 15):—

> "Provided that it shall be lawful for the county council if they see fit to arrange otherwise than by contract for the repair of court houses, sessions houses, piers, and quays, bridges, culverts, *guard-walls*, sign-posts, and milestones."

The words "guard-walls" refer to the walls described in sect. 56 of the Grand Jury Act, 1836, as adapted by the Schedule to the Local Government "Adaptation of Irish Enactments Order" of 30th January, 1899, as walls "necessary to the support of, or to prevent any steep banks of earth from falling on any public road." Of these walls, that in question is one.

This brings me to the question of the extent by which the Local Government Act differentiates the liability of a County

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Council from the former liability of a Grand Jury. It is not only that the County Council is a corporation, having a continued existence, whilst the Grand Jury was an evanescent body, existing only during the assizes, and at its termination not only ceasing to exist, but leaving, as I think, no successor. The alterations effected by the Act are much more radical. Assuming, that which I doubt, that the Grand Jury Acts imposed upon a Grand Jury an *obligation* to make presentments for sums sufficient to repair the roads as distinguished from giving it *power* to do so; I cannot find amongst its powers any which authorised it to raise a sum of money to pay damages for the neglect of a contractor; and the Grand Jury Act, section 1, enacted that there should be no presentment, save under the authority of that Act. As to them, *Duncan* v. *Findlater* (1) would appear a conclusive authority against their liability. Upon the other hand, one of the great objects of the Local Government Act was to give statutory powers and liabilities to the new bodies, somewhat analogous to those of corporations; and it provides a fund out of which County Councils are, by section 45, subsection 1, authorized to pay, as could Municipal Corporations and public Companies pay, "the expenses of the execution of the Act"—a fund which therefore is applicable to the discharge of the amount recovered in the present case: *Galsworthy* v. *Selby Dam Drainage Commissioners* (2); *Wheeler* v. *Board of Works* (3). This is the first and most important of the distinctions by which the character of a Grand Jury differs from that of a County Council. The second distinction between a Grand Jury and a County Council is that even were it under an *obligation* to present money for repair of roads, it undoubtedly was under no obligation to repair them. Therefore, when a contractor was engaged in such repair, he was not performing the duty of the Grand Jury. The duty of repairing was the Common Law one, which rested on the inhabitants of the parish. On the other hand, sect. 82 of the Act imposes upon the Council an express duty to keep, according to its powers, all public works maintainable at the cost of the County in good order and repair, and to

(1) 6 Cl. & F. 894. (2) [1892] 1 Q. B. 348. (3) [1903] 2 I. R. 202.

take all necessary steps for that purpose. Although this section does not impose upon the County Council an *actionable* liability for non-repair, it makes a great change in their legal liability, for now when a person even under a contract is repairing a road, the County Council are, *through him*, performing a duty thrown upon them, and thus the question arises which I have already discussed, and which could not arise under the Grand Jury Act, viz. the effect of the delegation of the performance of that duty to one who neglects it.

The third distinction between a Grand Jury and a County Council comes from sect. 83 of the Act, which provides that—

> "The council of a county other than a county borough, subject to the provisions hereinafter contained, (*a*) shall appoint ... county surveyor ... and (*b*) may appoint such assistant surveyors and such further officers as they think necessary for the performance of the duties of the county."

Under the Grand Jury Act, there was no power to appoint any officer, except the county surveyor and assistant surveyors; and their appointment was vested, not in the Grand Jury, but in the Lord Lieutenant. The power to appoint servants was the *ratio decidendi* of *Foreman* v. *Mayor of Canterbury* (1).

Thus, the defendants were not only authorised to execute the work in question, but a duty was imposed upon them to do so; they had power to appoint officers to see that their duties were properly carried out, and a fund was provided for the payment of damages for acts of misfeasance in carrying out those duties. The question is whether, although they have these powers, they are, *by virtue of their constitution*, exempted, in respect of acts within their corporate powers, from liability which, under similar circumstances, would have attached to a private person.

The law upon this subject is, I am happy to think, well settled, since the decision of the House of Lords in *Mersey Docks Trustees* v. *Gibbs* (2). The defendants there were a body constituted by statute, who had the right to levy tolls, not for their own profit, but as trustees for the benefit of the public. The question was their liability for acts of their servants. In delivering the opinion of the Judges there, Mr. Justice Blackburn states as follows (p. 107) :—

(1) L. R. 6 Q. B. 214. (2) L. R. 1 H. L. 93.

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"It is well observed by Mr. Justice Mellor, in *Coe* v. *Wise* (5 B. & S. 440), of corporations like the present, formed for trading and other profitable purposes, that though such corporations may act without reward to themselves, yet in their very nature they are substitutions on a large scale for individual enterprise. And we think that, in the absence of anything in the statutes [which create such corporations] showing a contrary intention in the Legislature, the true rule of construction is, that the Legislature intended that the liability of corporations thus substituted for individuals should, to the extent of their corporate funds, be co-extensive with that imposed by the general law on the owners of similar works."

The Lord Chancellor, in stating his opinion, says (p. 122):—

"Where such a body is created by statute, having the right to levy tolls *for its own profit*, in consideration of making and maintaining a dock or canal, there is no doubt of the liability to make good to the persons using it any damage occasioned by neglect, in not keeping the works in proper repair. . . . The only difference between that case and those now standing for decision by your lordships, is that there the appellants, in whom the docks are vested, do not collect tolls for their own profit, but merely as trustees for the benefit of the public. I do not, however, think that this makes any difference in principle in respect to their liability."

But, to my mind, the most instructive opinion in that case is that of Lord Westbury (p. 127):—

"It would be a very *unreasonable* and a very mischievous thing if, in the case of corporations dealing with the public or with individuals, such corporations should, by any conduct of theirs in respect of property committed to their care, give a right of action to individuals, that such *individuals should be deprived of the ordinary right of resorting for a remedy against the body doing or authorising these acts*, and should be driven to seek a remedy against the individual corporators, whose decision or order, in the name of the corporation, may have led to the mischief complained of. It is much more reasonable in such a case that the trust or corporate property should be amenable to the individual injured, because there is then no failure of justice, seeing that the beneficiary will always have his right of complaint, and his title to relief against the individual corporators who have wrongfully used the name of the corporation."

In my opinion these words enunciate the true principle upon which the liability of these corporations is based.

Shortly after the decision of that case, there was a decision of our Court of Exchequer Chamber which went almost further. I refer to *Levingston* v. *Guardians of Lurgan Union* (1). The action was brought against the Poor Law Guardians, in their corporate capacity, for injury caused to the plaintiff by making a sewer, and discharging sewage from the workhouse into a stream to the use of which the plaintiff was entitled; and it was held that the action was maintainable, although it did not appear that the rates or other corporate property of the Guardians were applicable to satisfy the damages which might be recovered. This case was followed in this country by *Wheeler* v. *The Board of Works* (2), in which it was held that the principle applied, in the case of *The Mersey Docks Trustees* v. *Gibbs* (3), to incorporated trustees who took tolls for the benefit of the public, was applicable to the defendants there, in relation to their duties under the Stephen's Green Act.

It is right to refer here to *Duncan* v. *Findlater* (4). That was a decision upon a Scotch appeal; but the *ratio decidendi* was that the Scotch law in reference to the case was identical with that of England, and the case is, therefore, an authority on the law of this country. The defendants were trustees under a Public Road Act, whose surveyors or contractors were engaged in constructing or repairing a large drain or ditch, running along the side of a turnpike road, and they were sought to be made responsible in damages to the pursuer, who having occasion to travel along the road by night, came in contact with a heap of stones intended to be used in the operation in question, which had been thrown down and allowed to remain upon the road so as to form a dangerous obstruction to travellers at night. The trustees there had been appointed under a local Act, 2 Wm. 4, c. xxxii., which contains a provision in sect. 16, that the tolls should be applied to certain specified purposes, which did not include compensation to injured persons, "*and to no other purpose whatsoever.*" The House of Lords were of opinion that, having regard to these words, damages in the action could not be paid out of the tolls, and, therefore, that the trustees

(1) I. R. 2 C. L. 202.
(2) [1903] 2 I. R. 202.
(3) L. R. 1 H. L. 93.
(4) 6 Cl. & F. 894.

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were not liable. The *ratio decidendi* is thus stated by the Lord Chancellor (Cottenham), p. 903:—

> "In England, we have long held that trustees of a turn-pike road are not liable in cases of this sort: *Baker* v. *Harris* (4 M. & S. 26), *Humphries* v. *Mears* (1 M. & R. 187), and *Hall* v. *Smith* (2 Bing, 156). In all these cases it was distinctly held that such trustees are not answerable but for their own personal default. There is another class of cases in which it has been decided that trustees exceeding the authority given them may be personally liable, but keeping within it they are not answerable. In this instance there is no pretence for setting up personal liability."

Later on, Lord Cottenham propounds his celebrated dilemma, which has since been the subject of so much controversy:—

> "Reference has been made to the 10th section of the General Turnpike Act, which authorises the trustees to appoint surveyors and other officers, with reasonable salaries, as showing that the persons employed on the works must be considered as their servants, and therefore as persons for whose conduct they are answerable. But I think that argument cannot be supported, and at the utmost it is but an inferential argument adduced to support a proposition directly contrary to the plainest words of the statute, by which it is ordained that the funds thereby raised shall be applied to the purposes therein set forth, '*and to no other purposes whatsoever*.' It is impossible to suppose that the framers of this statute contemplated that any part of this fund would be appropriated for the purpose of affording compensation for any act of the persons who might be employed under the authority of the trustees. If the thing done is within the statute, it is clear that no compensation can be afforded for any damage sustained thereby, except so far as the statute itself has provided it; and this is clear on the legal presumption that the act creating the damage being within the statute must be a lawful act. On the other hand, if the thing done is not within the statute, either from the party doing it having exceeded the powers conferred on him by the statute, or from the manner in which he has thought fit to perform the work, why should the public fund be liable to make good his private error or misconduct? Cases may possibly be supposed in which the funds raised by a statute would be liable for acts done strictly in pursuance of the directions of that statute, but none in which such funds would be liable for acts done without the authority of the statute."

The decision there was in reference to trustees acting under a

Scotch Turnpike Act; and whether the reasoning by which it is arrived at be now deemed satisfactory or not, I apprehend that it must be deemed, until overruled by Act of Parliament, to be a binding authority in cases against trustees acting under any Act framed in substantially similar words. But the Judges in *The Mersey Docks Trustees* v. *Gibbs* (1) point out, through Mr. Justice Blackburn, that although Lord Cottenham was there speaking of those trustees, his reasoning is general, and that the dilemma, if a good one, is applicable to all cases.

> "This is" (they say) "no doubt a very high authority, being said by the Lord Chancellor in the House of Lords, though in a Scotch case; but not being the point decided by the House, it is not conclusively binding; and we think that, with great deference to his high authority, *we must dissent from the position there laid down*, both on principle and on the preponderance of authority."

The Lord Chancellor (Lord Cranworth) contents himself by expressing his concurrence in the opinion of the Judges, but Lord Westbury refers more at length to the grounds of the decision. He says (page 126):—

> "But I think it desirable to say a few words with reference to the difficulty felt by the learned Judges in consequence of certain observations that fell from Lord Chancellor Cottenham, and which are reported in the case of *Duncan* v. *Findlater* (6 Cl. & F. 894). I can well divine what was at that time passing in the mind of Lord Cottenham. He seems to have thought that if persons constituting a corporation are trustees of property for the direct benefit of certain individuals, and there is no other than corporate property—and if in their capacity as trustees an act is done, by order of the corporation, which amounts to a tort or a trespass, and gives a right of action and a right to damages to any private individual, a Court of Equity would not permit an execution to issue, on any judgment that might be recovered, against the property of the corporation, seeing that it is property held upon trust for certain beneficiaries, and that the corporation, as trustees, have no interest therein. But, my lords, I apprehend that *that was a misapprehension on the part of the noble and learned lord*, and that it would lead to very mischievous consequences. It is by no means true that a Court of Equity is able to protect the property of beneficiaries

(1) L. R. 1 H. L. 93.

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against the act of trustees. If trustees alienate property for valuable consideration to a person who pays that consideration, without notice of the trust, the interests of the beneficiaries suffer from that act."

In my opinion the effect of these two decisions of the House of Lords is that the principle of *Duncan* v. *Findlater* (1) does not bind, in any cases except those practically identical with that then before the House; certainly not in any case in which the statute incorporating the body sought to be made liable does not contain the words which seem to be the foundation of the Lord Chancellor's opinion: "and to no other purpose whatever." There are no such words in the Local Government Act. Upon the contrary, as I have shown, that Act provides a fund applicable to the payment of damages in such an action as the present; and after the best consideration I have been able to give the matter, I think the conclusion is inevitable that the defendants here are not within the decision in *Duncan* v. *Findlater* (1), but are within that of *The Mersey Docks Trustees* v. *Gibbs* (2); *Levingston* v. *The Guardians of Lurgan Union* (3); and *Wheeler* v. *Board of Works* (4).

Nor is this result an undesirable one. It is the defendants who select the contractor, who satisfy themselves as to the solvency of his sureties, and who dictate the terms of the contract. They can protect themselves by insisting upon having solvent sureties, capable of indemnifying them, and by having proper clauses in their contract. Upon the other hand, if we hold the defendants not liable, the lives and limbs of the public will be left at the mercy of any man of straw whom the defendants may select as contractor.

One matter was much argued, upon which I do not express an opinion: whether the defendants would have been liable, if Article 22 of the Local Government Board Order had remained in its original form, that is, if the County Council would have been compelled to do the work by contract? The point is an important one, and it may arise hereafter in reference to the repair of roads not within the alteration made in Article 22. It raises serious considerations on each side: on the one hand, in favour of their

(1) 6 Cl. & F. 894.
(2) L. R. 1 H. L. 93.
(3) I. R. 2 C. L. 202.
(4) [1903] 2 I. R. 202.

non-liability, the want of power to protect themselves by employing their own servants is relied on; while, on the other hand, there is the fact that they are empowered by statute to contract, and that it is the contract which creates the liability. I wish to state that I give no opinion on that point.

I am of opinion that the direction of Walker, L.J., at the trial, was right, that the verdict should stand, and that the present motion should be refused with costs.

ANDREWS, J.:—

This was an action to recover damages for injuries occasioned to the plaintiff by reason of an obstruction on a public road in the county of Tyrone, caused by a heap of stones left thereon, whereby the plaintiff, while driving along the road, had his vehicle overturned, and received personal injuries.

It was the duty of the defendants under the 82nd section of the Local Government (Ireland) Act, 1898, to keep, according to their powers, all public works maintainable at the cost of the county in good condition and repair, and to take all steps necessary for that purpose. This duty, of course, involved authority to perform the requisite work. A retaining wall on one side of the road in question, where there was a cutting, being out of repair, the defendants, on the 6th of November, 1903, entered into a contract with one Edward Boyle to repair it, and in order to do so it was necessary to take down a part of the wall, and rebuild it, and to sink foundations for the new work below the level of the road-surface. Materials for the execution of this work had to be brought to, and placed upon, the road; and a heap, consisting of stones for the rebuilding, and gravel and clay removed to form the foundations, was left by the contractor unlighted and unguarded upon the road. The plaintiff's vehicle, while he was driving along the road when it was dark, struck against this obstruction and was overturned, and personal injuries were thereby sustained by the plaintiff. The learned Judge before whom the case was tried reports that it was not contended that the plaintiff was in any way negligent, nor were the wrongfulness and carelessness of so leaving the obstruction on the road questioned. It was an act of wrongful misfeasance. At the trial, a verdict was found for the platintiff,

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with £200 damages; and the defendants have moved to set it aside, and have the verdict and judgment entered for them.

During the argument it was not disputed that the defendants (unlike the Grand Jury) were a body which could be sued, but it was contended on behalf of the defendants (amongst other things) that the work of repairing the wall was one which, under the 22nd clause of the Procedure of Councils Order of the 30th of January, 1899, they were bound to have executed by contract, and that they having employed a contractor, whose fitness was not in question, to do the work under a contract, the sufficiency of which was not in question, they were not responsible for the result of what was admittedly the contractor's negligence. It appeared to be conceded during the argument that it was obligatory upon the defendants to have the work in question executed by contract, having regard to this 22nd clause. Towards the conclusion of the arguments it was casually mentioned that under certain legislation subsequent to the Local Government Act of 1898, and the Procedure Order of 1899, certain alterations had been made in that Order, under which it was competent for a County Council, with the sanction of the Local Government Board, to adopt a scheme enabling them to execute certain public works relating to roads by direct labour under the charge of the county surveyor, but that no such scheme had been adopted by the defendants, or sanctioned by the Local Government Board; and it was assumed that the obligation of the defendants to have the work of repairing the wall in this case executed by contract had not been altered. The Court has since, however, by the courtesy of the Local Government Board, who were applied to, obtained the alterations of the Procedure Order of 1899. Under the Act of 63 & 64 Vict. c. 41, passed in the year 1900, power was given to the Local Government Board to annul or vary any provision in the Procedure Order of 1899 by Provisional Order confirmed by Parliament; and upon the 8th of May, 1901, the Local Government Board made a Provisional Order to come into operation on the 1st of April, 1902, which was confirmed by the Act of 1 Edw. 7, ch. cxli., passed in the year 1901. By this order the following clause was added to clause 22 of the Procedure Order of 1899, viz.:—"Provided that it shall be lawful for the County Council, if they see fit, to arrange

otherwise than by contract for the repair of court houses, session houses, piers, and quays, bridges, culverts, *guard-walls*, sign-posts, and milestones"; the object of this amendment manifestly being to provide for the prompt repair of the specified subjects. The wall in question appears to me to clearly come within the words "guard-walls," which are included in the class of public works referred to in the 22nd clause of the Procedure Order of 1899. "Public work" is defined by section 109 of the Act of 1898 to mean any road or work in respect of which under the Grand Juries Acts a presentment might but for that Act be made by any presentment sessions, "or any Grand Jury"; and by the 56th clause in the schedule to the Application of Enactments Order of the 30th of January, 1899, it is provided, in the adaptation of the Grand Jury Act of 6 & 7 Wm. 4, c. 116, that it shall be lawful for any County Council to resolve (which is in lieu of the former presentment) that the necessary money be raised for (amongst other things) the building or repairing any wall or part of a wall necessary to the support of, or to prevent any steep banks of earth from falling upon any public road. It thus appears that the defendants were relieved from the *obligation* of having the work of repairing the wall in question executed by contract, and that they could, had they so desired, have arranged otherwise than by contract for its repair.

This removes the difficulty which I felt until we obtained the amendment I have referred to of clause 22 of the Procedure Order of 1899.

On the assumption that it was *obligatory* upon the defendants to have the work of repairing the wall in question executed by contract, there being no exception taken either to the contract or the contractor, I was not, and would not, as at present advised, be prepared to hold that the defendants were responsible for the contractor's negligence in leaving the obstruction on the road, unlighted, and unguarded, whereby it became a danger to those lawfully using the road.

No case was cited, and I have been unable to find any case in which a body such as the defendants was held liable for the negligence or misconduct of a contractor to whom they were *bound* to entrust the execution of the work. Such a case appeared

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to me to be of the first impression, and to be one in which the defendants' duty and obligation being to entrust the execution of the work to a contractor, their duty could not be regarded as in any respect delegated by so entrusting it; but would be performed by doing so, there being no exception taken to either the contractor or the contract. It appeared to me that to hold otherwise would have very far-reaching consequences, and would practically amount to this—that although the defendants were bound to entrust the work to a contractor, they would be liable for his negligence or misconduct without having the power of protecting themselves by doing the work by their own officers or servants, over whom they could have direct control. This anomalous liability (as I would regard it), if it existed, would attach in each of the numerous cases in which it continues to be obligatory upon the defendants and many other County Councils to have the work executed by contract, including all road contracts not coming within the amendment of clause 22 of the Procedure Order of 1899. I have thought it right to say so much on this question, having regard to the course of the argument; but it is not necessary to give a decision upon it. Now, however, the defendants' liability in the present case appears to me to be settled by authority. The work to be done involved a certain amount of obstruction of the road, and the defendants' duty to have the work done involved the further duty of using all due precautions to prevent danger to those using the road by anything done in the execution of the work. In a case like this, in which they were not bound to employ a contractor, I think it clear, on the authorities, that they could not escape liability for the non-performance of the duty to use such precautions by delegating the execution of the work to a contractor; and the doctrine of the non-liability of the employer for the negligence of an independent contractor has no application to such a case.

I do not feel it necessary to do more than refer to the recent case in the Court of Appeal in England of *Hardaker* v. *The Idle District Council* (1), in which the defendants employed a contractor to construct a sewer for them, which they were authorised to con-

(1) [1896] 1 Q. B. 335.

struct under their statutory powers. In consequence of the contractor's negligence in carrying out the work, a gas-main was broken, and the escape of gas caused an explosion in the plaintiff's house, whereby his wife was injured, and his furniture damaged. It was held that the defendants owed a duty to the public (including the plaintiff) to so construct the sewer as not to injure the gas-main, and that there had been a breach of this duty for which they were responsible to the plaintiff, as they could not escape from liability for the non-performance of it by delegating the performance of it to a contractor. The defendants in that case, as in this, were not bound to employ a contractor, though they might employ one; but if they did so, it was pointed out that they could not thereby get rid of their own duty to other people. All the important cases on this subject were referred to and considered in that case, including *Dalton* v. *Angus* (1), in which Lord Blackburn contrasted what was called the collateral negligence of a contractor with his failure to perform the duty of his employer, for which failure his employer is liable.

In *Hardaker's Case* (2), Lindley, L.J., in dealing with the defendants' duty, said, at page 342 of the report:—"Their duty in sewering the street was not performed by constructing a proper sewer. Their duty was not only to do that, but also to take care not to break any gas-pipes which they cut under. . . This duty was not performed; they employed a contractor to perform their duty for them, but he failed to perform it. It is impossible, I think, to regard this as a case of collateral negligence. . . . The case is one in which the duty of the District Council, so far as the gas-pipes were concerned, was not performed at all." I shall not occupy time by referring more particularly to the authorities on this subject, for I regard it as now settled law that no one can get rid of such a duty as that of the defendants in the present case (viz., to have all due precautions taken to prevent anything done in the execution of the work from occasioning danger and damage to any person lawfully using the public road) by delegating the performance of it to a contractor.

The case of *Duncan* v. *Findlater* (3) in the House of Lords,

(1) 6 A. C. 740, 829. (2) [1896] 1 Q. B. 335. (3) 6 Cl. & F. 894.

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duty to rebuild and repair this retaining or guard-wall. It was, therefore, competent for the County Council to employ a contractor to execute this work, or to execute it themselves by their own officers and workmen. The course they adopted was to contract with Boyle (who, presumably, in the absence of evidence to the contrary, was a competent and efficient contractor) for the rebuilding and reparation of the wall according to the specification of the county surveyor, and thereby the County Council, as the road authority, impliedly authorised their contractor to make such use of the road as was reasonably necessary for the due and proper execution of his contract. But the County Council did not, by merely entering into this contract, discharge themselves of their paramount duty to the public, to keep the road reasonably safe for public traffic during the execution of the contract work. Lord Justice FitzGibbon, in *Westropp's Case* (1), emphasizing the judgment of the Lord Chief Baron in the same case, plainly points out and defines the measure of the duty of the County Council. As owing to the contiguity of the bank of earth to the wall, the work could not be carried on inside the wall, it necessitated reasonable use of the public road for that purpose, and for placing stone, mortar, and other materials used in the work, on the road temporarily, and possibly erecting scaffolding on the road side of the wall. This necessarily involved more or less obstruction to the public traffic and hazard to the public traversing the road, and the duty of the County Council was, by their officers, to take care that the public traffic was not unnecessarily obstructed, and that the public safety was not endangered by or during the execution of the work. The contractor's workmen placed, and, on the evening in question, left in the condition I have mentioned, projecting out on the roadway, this compact heap of stones and earth, materials probably used in, or rubbish from, the work they were engaged on, and against which the plaintiff drove and met with his misfortune. The public safety appears to me to be the paramount consideration. The work which Boyle was employed to carry out was lawful; executing it from the roadside was necessary; and *ex facie*, so to speak, in the natural course of things, involved danger

(1) [1904] 2 I. R. 569, at p. 583.

to the public, as of right lawfully traversing the public road, unless reasonable precautions and means were taken to obviate such dangerous consequences; and I think it was the duty of the County Council, by their officers, to see that such reasonable precautions and means were adopted as were necessary to prevent, or at least minimise, the mischief which might otherwise ensue. For default in discharge of their duty the County Council is not absolved from responsibility to any member of the public who sustains injury by such default, whether the County Council employed a contractor to execute the work, or in the terms of the Provisional Order, 8th May, 1901, saw fit to arrange for its execution otherwise than by contract; their duty to the public was to take proper steps, through their own officers, to see that the work, lawful in itself, was so carried on as not to be wrongful through negligence or otherwise. I take it to be now settled law (from which I see no reason for excepting County Councils) that persons, corporate or not corporate, to whom a public duty is entrusted, with the means of discharging such duty, are responsible for misfeasance in the due and proper discharge of their duty no less (and this, I think, is the measure of their obligation) than if they were private persons, and this whether their services are gratuitous or profitable; and I think a County Council is authorised by the Local Government Act (sects. 45 and 80) to raise funds to compensate in damages any person who sustains injury by their default as a County Council. I do not stop to cite further cases for these propositions. The Lord Chief Baron has reviewed and examined the material authorities, and as Bowen, J., says in *Dalton* v. *Angus* (1) :—*Entia non sunt multiplicanda præter necessitatem*; but to the cases examined by the Lord Chief Baron may be added *Maxwell* v. *British Thompson-Houston Co., Limited* (2), in which Collins, M.R., refers to *Hardaker's Case* (3) and *Bull* v. *Mayor of Shoreditch* (4), which was mentioned during the arguments. In my opinion, therefore, the verdict and judgment ought to stand.

Solicitor for the plaintiff: *Andrew C. Leitch.*
Solicitors for the defendants: *Dickie & Carson.*

J. L.

(1) 6 A. C. 740.
(2) 18 T. L. R. 278.
(3) [1896] 1 Q. B. 335.
(4) 19 T. L. R. 254.

K. B. Div. 1904.
Nov. 10, 11, 15, 16, 30.
Appeal. 1905.
Jan. 25–27. Feb. 28.

ARMSTRONG, Appellant; THE COMMISSIONER OF VALUATION IN IRELAND, Respondent (1).

Valuation Acts—Poor rate—Publichouse—Value of license taken into account—Valuation (Ireland) Act, 1852 (15 & 16 Vict. c. 63), s. 11—Appeal from valuation to Commissioner of Valuation—Appointment of valuators to view premises who had been engaged in the original valuation of other tenements in the same city—Valuation (Ireland) Act, 1852, ss. 17, 20.

In ascertaining the value, under the Valuation (Ireland) Act, 1852, of a licensed publichouse regard must be had to the existence of the license.

So *held*, by the King's Bench Division (Lord O'Brien, L.C.J., and Gibson, J.; Madden, J., *diss.*) and by the Court of Appeal.

The occupier of premises in the city of Belfast appealed to the Commissioner of Valuation against the value assessed on his premises upon a general revision of the valuation of Belfast, directed by the Lord Lieutenant. The Commissioner of Valuation directed two valuators to view the premises and make a report, as provided by sect. 20 of the Valuation (Ireland) Act, 1852. Neither of these valuators had been employed in the original revision of the valuation of the premises in question, but they had both been employed in the original revision of the valuation of other premises in the city of Belfast:—

Held, by the King's Bench Division and Court of Appeal, that the fact of the valuators having been employed in the original revision of the valuation of such other premises was no objection to their being appointed to value the premises in question.

Case Stated by the Recorder of Belfast, under 23 Vict. c. 4, section 10, upon an appeal against the decision of the Commissioner of Valuation fixing the annual rateable value of a certain licensed house and premises in the city of Belfast.

The following is a copy of the material portions of the case as stated by the Recorder:—

"2. The case was heard before me at Belfast on the 26th of May, 1904; Mr. Henry, K.C., appeared for the appellant, and Mr. Vesey Fitz Gerald, K.C., for the Commissioner of Valuation.

(1) In the King's Bench Division, before Lord O'Brien, L.C.J., and Gibson and Madden, JJ.

The Corporation of Belfast were not represented. The following facts were either proved or admitted.

"3. The Lord Lieutenant, pursuant to section 34 of the Valuation (Ireland) Act, 1852 (15 & 16 Vict. c. 63), directed the Commissioner of Valuation to make a general revision of the valuation of the city of Belfast, which general revision is hereinafter referred to as the revaluation.

"4. Prior to the revaluation the appellant was occupier of the licensed house and premises situate at Nos. 159 & 161, Shankill-road, in the city of Belfast. The said premises were then valued under the Acts relating to the valuation of rateable property at the annual sum of £115. Such sum did not include anything on foot of the value of the license.

"5. The Commissioner of Valuation, pursuant to section 17 of the Valuation (Ireland) Act, 1852, made out and signed a list of the several hereditaments and tenements contained in the re-valuation lists and their respective valuations, and transmitted copies of such lists to the town clerk, who duly published the same. . . .

"6. The appellant's said premises were valued in the revaluation lists at the annual sum of £185, which included a sum on foot of the estimated increased letting value of the premises attributable to the license.

"7. The appellant appealed against the said revaluation on the ground that the premises had been over-estimated. . . .

"8. The Commissioner of Valuation directed two valuers—namely, Mr. James Carroll and Mr. Charles Boland—to view the said premises, and investigate the complaint stated in the said notice of appeal, and report thereon to the Commissioner of Valuation (15 & 16 Vict. c. 63, s. 20). On the hearing of this case it was stated by counsel for the Commissioner that neither Mr. Carroll nor Mr. Boland was engaged in the original valuation of the premises the subject of this case, though they were engaged in the original valuation of other premises in the city of Belfast; and this does not appear to have been objected to by the counsel for the appellant.

"9. The Commissioner of Valuation, on the report of the said valuators, amended the annual valuation of the appellant's said premises by reducing the sum to £170.

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"10. The Commissioner of Valuation made out and signed a list of the cases in which he had amended or refused to amend the valuation contained in the original lists complained of, and transmitted such list so signed to the town clerk, who duly published the same. . . .

"11. The said William John Armstrong, the occupier of said premises, further appealed against the said valuation of £170, to the General or Quarter Sessions of the Peace for the City of Belfast, as provided by the 15 & 16 Vict. c. 63, section 22, on the ground that said valuation was *ultra vires* and excessive, and was not in conformity with the valuation of the surrounding property, and was not in accordance with the provisions of the Act in that case made and provided. . . .

"12. Thomas E. M'Connell, Robert Stewart, and James S. Oswald, examined on behalf of the appellant, gave evidence of the annual value of the premises as a building without reference to any additional rent which they might bring by reason of the premises being licensed. It was also given in evidence that the premises were held under fee-farm grant, subject to a yearly ground rent of £22, that £3120 had been paid for the premises, and £1100 subsequently expended on re-building. It was further deposed that the selling value of publichouses in Belfast had generally declined, and that in some instances they had depreciated to the extent of seventy-five per cent.

"13. The said James Carroll and Charles Boland, officials of the valuation office, valued the premises at the sum appealed against.

"It was admitted in evidence that the valuation of £170 was arrived at by valuing the premises as a building at £115, and the additional annual value attributable to the license at an estimated sum of £55.

"14. Mr. Henry, K.C., on behalf of the appellant, objected that it was contrary to law to value the license as forming a portion of the valuation of the premises; he further objected that the employment of the said James Carroll and Charles Boland to investigate and report on the complaint of the appellant to the Commissioner of Valuation was contrary to the provisions of 15 & 16 Vict. c. 63, s. 20, on the ground that they were valuers

who had been previously employed in making the original valuation contained in the lists. Mr. FitzGerald, for the Commissioner of Valuation, argued *contra*.

"14A. I find as facts that the annual value of the premises, exclusive of the license, is £115, and that their additional annual value by reason of their being licensed premises is £55.

"15. I confirmed the valuation on the ground that the valuation was made in conformity with the provisions of 15 & 16 Vict. c. 63.

"16. Pursuant to the provisions of the 23 Vict. c. 4, s. 10, I have been requested, on behalf of the appellant, William John Armstrong, to state a case setting forth the facts and grounds of my decision; and I state this case accordingly.

"The question for the consideration of the Court is what should be done in the premises."

Clancy (with him, *Matheson*, *K.C.*, and *Henry*, *K.C.*), for the appellant:—

We contend, in the first place, that the appointment by the Commissioner of Valuation of valuators on the occasion of the appeal to him was not in accordance with the condition required by section 20 of the Valuation (Ireland) Act, 1852, namely, that the valuator directed to make the report should be one "who shall not have been previously employed in making the original valuation contained in the lists as aforesaid." The words "lists as aforesaid" refer to the lists mentioned in section 17, which provides that as soon as the valuation of all the hereditaments and tenements within any county or poor law union, county of a city, or county of a town, shall be completed, the Commissioner of Valuation is to make out a list of the several hereditaments and tenements contained in each townland or other denomination therein. Thus, a unit is taken for valuation, *e.g.* the county or county of a city (in the present case the city of Belfast), and various lists are made out comprising the hereditaments in such unit, which are the lists referred to in sect. 20. We submit therefore that upon the true construction of these two sections "lists as aforesaid" means the lists for the county borough of Belfast; and as these two gentlemen—Messrs Carroll and Boland—were employed

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in making the original valuation contained in such lists, they were not capable of being appointed under section 20. The construction we contend for is in accordance with the language of the section, and also with its policy, the object obviously being to obtain a fresh and independent report from persons who had not been engaged in making the original valuation in the district.

Secondly, we contend that the existence of the license should not have been taken into account for the purpose of increasing the valuation. Sect. 11 of the Valuation (Ireland) Act, 1852, lays down the principle on which the valuation of houses and buildings is to be made, viz.: "upon an estimate of the net annual value thereof, that is to say, the rent for which one year with another the same might in its actual state be reasonably expected to let from year to year," the outgoings referred to in the section being paid by the tenant. We submit the words "its actual state" mean the actual physical condition of the building; they cover cases of structural alterations and improvements, but can have no reference to the existence of a license, which is merely a personal privilege. This construction has been acted upon ever since the passing of the Act, a period of over fifty years.

The decision of the House of Lords in *Cartwright* v. *Sculcoates Union* (1) will be relied on by the respondent. The head-note in that case, in so far as it states that in assessing the value of a publichouse for poor rate, the existence of the license is an element to be considered, is not warranted by the judgments, which contain no reference to the existence of a license. But, even if the head-note correctly represented the decision, there are material differences between the Irish Valuation Code and the Parochial Assessment Act, 1836, under which *Cartwright's Case* (1) was decided, which render that case inapplicable:—(*a*) The words "in its actual state" do not occur in the English Act. (*b*) Sect. 43, sub-sect. 7, of 43 & 44 Vict. c. 20, which applies only to Ireland, must be taken as a legislative recognition of the practice in this country that the license should not be taken into account in the valuation under the Valuation (Ireland) Act, 1852, since it authorizes an addition of twenty per cent. to such valuation for the purpose of

(1) [1900] A. C. 150.

determining the annual value upon which the duty on the license is to be charged. If the license was to be taken into account in the valuation, it would be manifestly unjust that twenty per cent. could be added for the purpose of determining the license duty. (*c*) There is no section in the English Act corresponding with sect. 12 of the Valuation (Ireland) Act, 1852. That section specifically enumerates the hereditaments which are to be deemed to be rateable hereditaments. If it had been intended that the license, as distinct from the house, should be rated, the license would have been specifically mentioned in the section as a rateable hereditament. In *M'Master* v. *Banbridge Union* (1), Lefroy, C.J., held that the English decisions did not apply to the Irish Valuation Code.

There has been an unbroken practice in this country for upwards of fifty years not to take the license into account in the valuation, and the Court should not now depart from such practice: *In re Kane* (2); *Leigh* v. *Kent* (3).

R. C. K. Wilson and *J. F. V. Fitz Gerald, K.C.*, for the respondent:—

With reference to the main question, viz. whether the existence of the license should be taken into account in the valuation, that identical question was before the House of Lords in *Cartwright* v. *Sculcoates Union* (4). The contention of the appellant there, as set out in the special case stated by the arbitrator, was that in valuing the publichouse for the purpose of poor rate, the existence of the license must be left out of consideration on the ground that the license is a personal privilege granted to the occupier, and does not increase the value of the house itself (5). The arbitrator held that this contention was wrong, and the House of Lords upheld the arbitrator in this view. There had been previous decisions to the same effect: *The King* v. *Bradford* (6); *Middlesex Waterworks Co.* v. *Coleman* (7).

As to the attempt which has been made to distinguish the

(1) 4 Ir. C. L. R. 394.
(2) [1901] 1 I. R. 520.
(3) 3 T. R. 362.
(4) [1900] A. C. 150.
(5) [1899] 1 Q. B. at p. 670.
(6) 4 M. & S. 317.
(7) 14 Q. B. D. 529.

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Irish from the English Valuation Code, three matters have been relied on.

(*a*) That sect. 11 of the Valuation (Ireland) Act, 1852, contains the words "in its actual state," which are not found in the English Act; and that these words confine the valuation to the physical condition of the premises. The words in question were adopted from sect. 64 of 1 & 2 Vict. c. 56, where clearly they cannot mean physical condition, since some of the hereditaments specified in sect. 63 of that Act, which, by sect. 64, are to be valued in their actual state, are incorporeal hereditaments, such as tolls. How could actual state, as applied to a toll, mean physical condition? We submit that the words "in its actual state," in sect. 11 of the Valuation (Ireland) Act, 1852, merely mean that the hereditament is to be valued at its then existing value—in its existing condition, having regard to all the surrounding circumstances—so as to preclude any speculative valuation as to probable future alteration.

(*b*) Reliance has been placed on sect. 43, sub-sect. 7, of 43 & 44 Vict. c. 20, as being a statutory recognition of the difference between the English and the Irish codes with respect to valuing licensed premises. We submit that the object of the sub-section was this:—In England there is a re-valuation every year. In Ireland the valuation remains permanent, unless steps to have it revised are taken by the Lord Lieutenant at the suggestion of the county council or by the collector of poor rate or a ratepayer: Valuation (Ireland) Act, 1852, sect. 34; Valuation (Ireland) Act, 1854, sect. 4. The object of sect. 43, sub-sect. 7, of 43 & 44 Vict. c. 20, is that if none of these persons is willing to call for a revision of the valuation, the excise authorities may themselves alter the valuation, within certain limits, for the purpose of assessing the license duty. The Legislature contemplates an alternative and distinct valuation jurisdiction as vested in the Commissioners of Excise, such as was given by 6 Geo. 4, c. 81, sect. 5. With reference to the objection urged that if the valuation under the Act of 1852 is increased by taking the license into account, it is liable to be further increased by twenty per cent. under sect. 43, sub-sect. 7, of 43 & 44 Vict. c. 20, which would be manifestly unjust, the answer is that any assessment under that sub-section is

subject to an appeal at Quarter Sessions. The Act of 1852 cannot be construed by the light of the subsequent statute: Hardcastle on Statutes, page 162; *Warn* v. *Folkestone Waterworks Co.*, *per* A. L. Smith, J. (1); *Knowles & Sons* v. *Lancashire and Yorkshire Railway Co.*, *per* Lord Halsbury, L.C. (2); *Macassey* v. *Thompson*, *per* Lord Davey (3); *Mersey Docks* v. *Cameron* (4).

(*c*) It is said that sect. 11 of the Valuation (Ireland) Act, 1852, specifically enumerates the hereditaments which are to be rateable; and that as a license is not mentioned, it is not to be taken into account. The answer is that the license is not itself valued, but is an element in determining the value of the rateable hereditament, the publichouse. The license in such case is a part of the equipment of the house, as much so as the counter.

The view taken by Lefroy, C.J., in *M'Master* v. *Banbridge Union* (5) as to the difference between the English and Irish statutes was expressly dissented from by Crampton, J., and Moore, J., in their judgments.

As to the argument that the Court in interpreting the statute should recognise a practice which has existed for upwards of fifty years, this doctrine of *contemporanea expositio* is now, to a great extent, exploded; and if the practice was founded upon an erroneous construction of the Act of Parliament, there is no principle which prevents the Court from correcting the error: *Hamilton* v. *Baker*; *The "Sara," per* Lord Macnaghten (6). At all events the statute in the present case is much too recent to be construed on this principle: *Trustees of Clyde Navigation* v. *Laird*, *per* Lord Watson (7); *The King* (*Ballycastle U.D.C.*) v. *Local Government Board* (8). [They also referred to *Commissioner of Valuation* v. *Clonbrock Coal Company* (9); *Brennan* v. *Dorney* (10); *Re O'Brien* (11); *Kelly* v. *Montague* (12).]

As to the first point relied on, that the valuators were incompetent by reason of having been employed in the original valuation

(1) 62 L. T. (N. S.) 321, at p. 325.
(2) 14 A. C. 248, at p. 253.
(3) 36 I. L. T. R. 163, at p. 164.
(4) 11 H. L. Cas. 443.
(5) 4 Ir. C. L. R. 594.
(6) 14 A. C. 209, at p. 222.
(7) 8 A. C. 658, at p. 673.
(8) [1904] 2 I. R. 270.
(9) [1896] 2 I. R. 560.
(10) 21 L. R. Ir. 353.
(11) 11 L. R. Ir. 213.
(12) 29 L. R. Ir. 429.

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of other premises in Belfast, we submit that the words "original valuation," in sect. 20 of the Valuation (Ireland) Act, 1852, mean the original valuation of the tenement in respect of which the notice mentioned in sect. 19 has been served. In any event the section is directory merely, and not mandatory. The fact that these gentlemen were employed in valuing other tenements in Belfast does not prevent them being independent valuators: *The Queen* v. *Irish Land Commission*, *per* FitzGibbon, L.J. (1).

Matheson, K.C., in reply:—

In order that a hereditament should be rateable, it must be brought within one of the categories specified in section 12 of the Valuation (Ireland) Act, 1852. The only category within which the publichouse, in the present case, can be brought is that of "building." The thing, therefore, to be valued in its actual state is the building.

In England, prior to the Parochial Assessment Act, 1836, the liability to be rated depended on 43 Elizabeth, c. 2, by which inhabitants were to be rated according to their ability. The practice, therefore, prevailed in England of including the value of the stock-in-trade and good-will in the valuation of the hereditament. The proviso at the end of section 1 of the Parochial Assessment Act, 1836, that nothing therein contained was "to alter or affect the principles or different relative liabilities (if any) according to what different kinds of hereditaments are now by law rateable," left the law in this respect practically what it had been before that Act. It was, in fact, found necessary to pass a subsequent Act (3 & 4 Vict. c. 89) to exempt stock-in-trade. Under the English code, therefore, the idea had become ingrained that good-will and trade profits were taxable, and the decision in *Cartwright* v. *Sculcoates Union* (2) was founded on this principle. Lord Halsbury and A. L. Smith, L.J., in giving judgment in the Court of Appeal (3), thought it would be legitimate to give evidence to show that a good trade was being carried on in the premises, and this view was adopted by Lord Davey in the House of Lords (4).

(1) [1899] 2 I. R. 399, at p. 424.
(2) [1899] 1 Q. B. 667; [1900] A. C. 150.
(3) [1899] 1 Q. B. at p. 674.
(4) [1900] A. C. at p. 159.

That decision, therefore, is not an authority on the Irish Valuation Acts, under which only certain specified hereditaments are rateable.

The practice in Ireland of not taking into account the value of the license is in accordance with the instructions issued to valuators by Sir Richard Griffith. These were issued in pursuance of sect. 6 of the Act of 1852, and have the force of a statute.

[He referred to *Tyne Boiler Works Company* v. *Overseers of Longbenton* (1); *The Queen* v. *Justices of Cavan* (2).]

Cur. adv. vult.

Nov. 30.

MADDEN, J. :—

This case has, in the course of argument, travelled a long way from the decision of the learned Recorder of Belfast. Holding that, for the purpose of the Irish Valuation Act, the "actual state" of a house to which a license is attached is different from the state of the same building without that valuable adjunct, he was of opinion that the house should be valued and rated accordingly. But as the argument proceeded it became apparent, to my mind at all events, that the case involved a much wider question, and that the decision of the Recorder could only be sustained by applying to the construction of the Irish Valuation Act a long line of decisions upon English statutes which established the proposition that the occupier of rateable property is liable to be assessed upon an estimate of the rent which a hypothetical tenant might reasonably pay in the expectation of acquiring, in addition to the physical structure known as a house, the rather intangible entity known as the good-will of the business carried on within its walls. In Ireland the subject of rating is the hereditament, not the value of the occupation, and until the present case it has never been suggested that the existence of "good-will," in any sense of the term, could be taken into account. I refer to this fact merely as suggesting the extreme importance of this case, for a statute of so recent date as our General Valuation Act is not to be construed in conformity with *contemporanea expositio*, however authoritative and uniform: *Trustees of Clyde Navigation* v. *Laird* (3). But where there has been a uniform system of rating, adopted under statutory sanction, on the basis of which contracts have been entered into

(1) 18 Q. B. D. 81. (2) 30 L. R. Ir. 137. (3) 8 A. C. 658.

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during more than half a century, it behoves us to consider with great care the applicability to our Irish statutes of decisions, even of the House of Lords, upon the different statutes in force in England. Further than this the consideration of long and uniform practice cannot be pressed.

Nor am I disposed to yield to the argument that the question of the legality of the existing system of valuation has been closed by the recognition of it as an existing fact in the section of the Inland Revenue Act of 1880 (43 & 44 Vict. c. 20, s. 43, sub-s. 7) upon which so much reliance has been placed. In the view which I take of this case the decision of the point is unnecessary; but I should be slow to conclude that the legalising of an illegal system of rating was intended or effected by the Legislature when passing this Act. If the decisions of the House of Lords to which I am about to refer are applicable to the construction of our Irish Act, then the sooner the Irish practice is brought into conformity with these decisions the better. But the application of these decisions must be ascertained from a careful examination of the statutes, and not assumed from the similarity of the subjects to which they relate, or from general considerations of policy. For examples could easily be drawn from both the licensing and valuation code where differences were found to exist of such importance as to lead to a divergence between the law as laid down for England by the House of Lords, and as administered by this Court under the statutes applicable to Ireland.

I, therefore, address myself to the consideration upon the result of which this case must, in my view of it, depend—an examination of the English and Irish Valuation Acts, with a view to see to what extent decisions upon the one are applicable to the construction of the other. I begin with the English Acts for several reasons. They are earlier in date; they must be presumed to have been considered by the framers of the corresponding Irish statutes; the construction and application of them have been definitively settled by decisions of the House of Lords; and they are relied on as binding authorities which we are bound to follow.

In England the Poor Law Act (43 Eliz. c. 2) is still the principal Act under which rates are assessed. The rates were to be raised "by taxation of every inhabitant, parson, vicar, and other,

and of every occupier of lands, houses," etc., in the parish . . . . "to be gathered out of the same parish, according to the ability of the same parish." And as the ability of the parish depended on the profits realized by its inhabitants in trade, as well as on the value of the lands and houses which they occupied, regard was had to trade profits in two ways: first, as a subject of direct taxation, and, secondly, as adding to the value of the premises out of which they were earned. In this way personal property came to be rated, not exhaustively or in an inquisitorial fashion, but so far as it was visible to the overseers, the result being that the rates fell mainly on stock-in-trade and on other discernible equipments for the carrying on of business.

Accordingly, it was decided in *Sir Anthony Earley's Case* (1) that in any parish "assessments ought to be made according to the visible estate of the inhabitants there, both real and personal." The principle of the rateability of personal property, thus laid down, was never carried into practice to the full extent. Lord Mansfield, observing that "it would make the poor laws very oppressive if a man is to be taxed to the extent of his whole personal estate and income," added, "but where men are occupiers of houses and have stock in trade, whether such stock in trade may be taken into consideration is a very different question. Some personal estate may be rateable, but it must be local visible property within the parish": *R.* v. *Andover* (2). Take the case of a publican. The facts that he did a good business, and that his cellars were well stocked, were patent to the observation of the overseers, and he was rated accordingly. But no inquisitorial examination was permitted as to the amount of his profits, or as to the extent of his personal property.

The law remained in this uncertain and unsatisfactory condition until the year 1836, when a statute was passed entitled an Act to Regulate Parochial Assessments. Reciting that it was "desirable to establish one uniform mode of rating for the relief of the poor throughout England," it enacted that "no rate for the relief of the poor in England and Wales shall be allowed by any Justices, or be of any force, which shall not be made upon an estimate of the net annual value of the several hereditaments rated

(1) 2 Bulst. 354. (2) 2 Cowp. 550.

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thereunto, that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rentcharge, if any, and deducting therefrom the probable annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rents" (6 & 7 Wm. 4, c. 96, s. 1).

This, it will be observed, is an Act to regulate parochial assessments made by the overseers under the statute of Elizabeth. Its effect as regards the rateability of personal estate came under the consideration of the Court of Queen's Bench in the case of *The Queen* v. *Lumsdaine* (1), when it was decided that although the Legislature might have intended to alter the law upon the subject of the rating of personal property, the intention had not been carried into effect. "The object of the Act does not appear to have been to introduce any new principle of rating, but to affirm that which had been already established by decisions of this Court": *per* Lord Denman, C.J. "There has," he added, "existed a known and long-established practice of rating personal property in many cases, and the legality of such rates has been affirmed by this Court. The law therefore is not to be altered except by express enactment." The particular case before the Court was the rating of stock-in-trade; but the principle there laid down is of wider application, and includes the regard which was always had by the overseers to the profitable character of a business carried on by the occupier of premises. This decision led to the passing of the Poor Rate Extension Act of 1840 (3 & 4 Vict. c. 89), which enacted that it should not be lawful for the overseers of any parish, township, or village to tax any "inhabitant thereof, *as such inhabitant*, in respect of his ability derived from the profits of stock in trade or any other property, for or towards the relief of the poor." The words which I have italicised are important, in view of the proviso that nothing in the Act is to affect the liability of any occupier to be taxed for the relief of the poor. Thus, the statute left unaffected the general principles according to which profits were regarded by the overseers in estimating the liability of occupiers, while it relieved inhabitants, as such, from liability in respect of their personal estate.

(1) 10 A. & E. 157.

The effect of the Parochial Assessment Act was not (in Lord Denman's words) "to introduce any new principle of rating," but to regulate the practical application of principles already in force. Indeed, in a subsequent case the same learned Judge refers to the proviso in the first section of the Act as amounting to a declaration that the principles of rating are not to be altered or affected by it: *per* Lord Denman, C.J.: *R.* v. *London and South-Western Railway Company* (1). What the statute does is to provide a uniform system of assessment according to which existing principles were to be applied—that is to say, they were to be brought to the test of the rent which a tenant might reasonably be expected to pay having regard to all the circumstances of the occupation of the hereditament in question. The profits of the business carried on there were not to be rateable as such. But, inasmuch as the hypothetical tenant would be influenced by the existence of a profitable trade, the antecedently existing principle by which visible profits were regarded by the overseers, was to be applied in estimating the net annual value of the premises.

An authoritative and final exposition of the principles on which, in assessing occupiers under the statute of Elizabeth, the provisions of the Parochial Assessment Act are to be applied, is to be found in the cases before the House of Lords of *Cartwright* v. *Sculcoates Union* (2) and *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee* (3). These decisions lay down no new principle of rating, and they are mainly conversant with difficulties caused by former decisions, amongst others *Dodds* v. *South Shields Union* (4). But they place in a clear light the principle on which good-will is to be regarded. "What you are to find out is what a tenant will reasonably give, looking surely at all the circumstances of the occupation, including therein the business that has been done on the premises": *per* Lord Halsbury, C. (*Mersey Docks Case*, at p. 182).

In arriving at a conclusion on this point, the hypothetical tenant would be influenced by the apparent amount of business carried on in (for example) a publichouse, and he would have regard necessarily to the existence of the excise license without

(1) 1 Q. B. at 580.
(2) [1900] A. C. 150.
(3) [1901] A. C. 175.
(4) [1895] 2 Q. B. 133.

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which the business could not be lawfully carried on. An inquisitorial inquiry into the amount of profits ought to be avoided, according to the traditional policy of the rating law since the passing of the statute of Elizabeth. But the "volume of business done in a publichouse as apparent to the man in the street—if I may use such an expression—is the very first thing that a tenant proposing to make an offer for such a house would take into consideration": *per* Lord Macnaghten, [1900] A. C., at p. 153. Why? Because of the probability that customers would resort to the house, irrespective of the personality of the occupier. "Good-will," said Lord Eldon, "is nothing more than the probability that the old customers will resort to the old place": *Cruttwell* v. *Lye* (1); a definition expanded by Wood, V.-C., in *Churton* v. *Douglas* (2) so as to embrace all advantages acquired by the old firm, everything connected with the premises, and everything carrying with it the benefit of the business, including of course, in the case of a publichouse, the excise license.

The hypothetical tenant bases his estimate on the expectation of acquiring something in addition to a parcel of land, with buildings on it of a certain class, and occupying a certain position. He estimates the probability of the business running with the land, to borrow a legal phrase, at a rate which will vary according to the intimacy of its relation—on the one hand, to the man who may have created it; and, on the other, to the premises at which it was carried on.

Perhaps the best exposition of "good-will" is to be found outside our law books. Dr. Johnson explained that the purchaser of Thrale's brewery was acquiring not only vats and barrels, but the possibility of growing rich beyond the dreams of avarice. A similar possibility in very varying degrees may be supposed to enter into the calculation of the hypothetical tenant of every house in which a profitable business has been carried on. And if the decision of the Recorder is correct, this element ought to have been taken into account in the valuation of every such house in Ireland since the Valuation Act was passed.

Turning to the Irish Valuation Act, 15 & 16 Vict. c. 63, I find that, unlike the English Parochial Assessment Act, it is self-

(1) 17 Ves. 335. (2) John. 174.

contained, and not engrafted upon an earlier statute; and this circumstance affords, in my opinion, the key to the determination of this case. There were, indeed, earlier Valuation Acts, and valuation under the Poor Law Act, but their operation was entirely superseded by the Act of 1852—the general valuation under which was to be the continuation and completion of the work done under the earlier statutes. I have examined these statutes, and I can find no indication that the valuation under their provisions was of a more extended character than under the Act of 1852, the construction of which is not in any way aided by antecedent legislation.

The 12th section of this Act prescribes the hereditaments which are to be deemed rateable for the purposes of the Act. The enumeration includes lands, buildings, opened mines, profits *à prendre*, rights of fishery, canals, railways, easements and tolls. Dealing with the case before us, a licensed publichouse is rateable, inasmuch as it is a building. As to some of the rateable hereditaments, possession is synonymous with profitable enjoyment—the rateable toll (for example) is the sum levied as such—but as regards the most important classes of hereditaments—lands and buildings—it seemed necessary not to leave the matter at large, but to establish some clear and definite criterion of rateable value. We are not concerned with the principle on which the valuation of land is to be made. As regards "buildings," in which term houses are included, the valuation is to be made "upon an estimate of the net annual value thereof—that is to say, the rent for which one year with another the same might in its actual state be reasonably expected to let from year to year, the probable annual value of repairs, insurance, and other expenses (if any) necessary to maintain the hereditament in its actual state, and all rates, taxes, and public charges, if any (except tithe rentcharge), being paid by the tenant."

The "hereditament" to which these words relate can be no other than a "building," under sect. 12; and reading this word into sect. 11, we find that the estimate of rateable value is to be the rent which the hypothetical tenant might be expected to pay in its (that is the building's) actual state—*rebus sic stantibus*—the tenant bearing certain expenses, including "repairs, insurance, and other expenses necessary to maintain the [building] in its actual state."

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No one could contend that a publican's license became part of the building, although it is an essential element in the good-will of the business carried on in the building, and unless regard is to be had to good-will in estimating what the hypothetical tenant is willing to pay, I can see no way in which the existence of a license can be taken into account.

I confess that I am not surprised that it has never been suggested up to the present case, in reported case, or text-book, that the word "building" was capable in our Irish rating statute of including good-will. The principles on which buildings were rated were officially made known to the public. Under sect. 6 the Commissioner of Valuation was bound to proceed with the valuation "in such manner and under such regulations" as the Lord Lieutenant should direct. The 8th section empowered the Lord Lieutenant to issue "orders, instructions, and directions," for the due execution of the Act. We have been furnished with copies of the statutory directions under which buildings in Ireland have been valued during more than half a century. I am not concerned with criticising these instructions. They cannot control the interpretation of the Act if they are *ultra vires*, or inconsistent with its provisions. In my opinion they would have been *ultra vires* if they had directed the valuer to regard as a criterion of letting value anything but the actual state of the building, although in the interpretation of the word "state" a good many circumstances might fairly be considered, provided they related to the building, and not to the profits of any business which may be carried on therein.

The provisions with regard to a hypothetical tenant in the Irish Poor Law Act and Valuation Act are copied from the section of the English Parochial Assessment Act, which the framers of these statutes must be presumed to have had before them. They must also be presumed to have been aware that the subject-matter of the hypothetical tenant's bargain had been defined by decisions upon the statute of Elizabeth to include, in the case of a house, a certain undefined expectation of good-will, the introduction of which into the English rating system had caused endless confusion. Accordingly, they were careful when copying the provisions of the English Act to define the rateable heredita-

ment in language which taken by itself is perfectly unambiguous, for it would be an abuse of language to describe good-will, in any sense of the term, as part of the building. Moreover, it must have been present to the minds of the framers of the Poor Law Act and of the General Valuation Act that the poor rate in England was borne by the occupier, by whom the business was carried on; whereas under the system which they were instituting in Ireland one moiety of the rate was, in ordinary cases, ultimately borne by the landlord—a distinction between the two systems to which great importance was attached by Lefroy, C.J., in a case to which I shall presently refer.

I do not think that we derive any great assistance from decisions or legislation subsequent to the passing of the Valuation Act of 1852. I note, however, that a statute was passed in the year 1854 providing, amongst other things, for the revision of the valuation "of the rateable tenements and hereditaments the limits whereof shall become altered and also of rateable tenements and hereditaments the annual value of which is liable to frequent alterations," including "buildings." Now the profits to be derived from a prosperous publichouse are eminently liable to variation; and if they could be regarded, the statute would hardly have concerned itself with the mere alteration of the limits of the physical structure. In the case of *M'Master* v. *Banbridge Union* (1), which came before the Court of Queen's Bench in the year 1855, it did not become necessary for the Court to determine to what extent the law of rating in Ireland corresponded generally with that in England. Mr. Justice Crampton appears to have regarded the statutes as substantially identical. Any expression of opinion on the part of this eminent Judge is entitled to respect. But this view of the statutes was not the ground of his decision, and it is to be noted that he speaks of the English law placing the valuation on "lands, tenements, and hereditaments only." A much more thorough examination of the English system is to be found in the judgment of Lefroy, C.J. He points out that the poor law in England is the statute of Elizabeth, under which personal property was rateable, "and when it comes to be used conjointly with the building, although not attached to it so as to be parcel of it, that then a

(1) 4 Ir. C. L. R. 394.

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conjoint rate was to be made, founded upon a conjoint valuation." Most of his observations are directly applicable to the suggested conjoint rating of a publichouse and its licensed trade. As a "decisive argument" against applying the English authorities to the suggested conjoint rating, he points out that "in England the occupier pays the whole rate; in Ireland the landlord must contribute a moiety of the rate. Who takes the profits? The tenant takes the whole profit, and the landlord is to pay half the rate, although he has no choice whether the machinery is to be introduced or not." Substitute "license" for "machinery" and the reasoning applies to the present case. The lessor of a desirable corner-house would, if the judgment of the learned Recorder be correct, find his share of the poor rate largely increased by an event as to which he had no choice, the success of his tenant in obtaining a publican's license and good custom, while at the next revision he might receive a welcome reduction by reason of a circumstance over which he had as little control, the appearance of the tenant before the Justices, when applying for a renewal, in a condition of intoxication, and the consequent loss of the license. I confess that this argument though powerful does not present itself to my mind as absolutely decisive, for there may be changes in the actual state of the house itself, in which the lessor has no choice, but by which the valuation would be affected. The incidence of taxation is, however, an important matter, which may be well supposed to have been considered by the framers of the Irish statute.

The result of my examination of the English and Irish statutes is to satisfy me that although the test of the hypothetical tenant is prescribed in similar terms, the subject-matter to which the test is to be applied is essentially different in the two countries. I have already quoted Lord Halsbury's statement that the overseer in England is to find out what the hypothetical tenant will give, looking at all the circumstances of the occupation, including the business carried on in the premises; and I have traced this principle of valuation not to the Parochial Assessment Act, but to the statute of Elizabeth. This the overseers do (as he points out at p. 180 of the same judgment), "unfettered by any statute as to the way in which they can do it." As regards Ireland, I have to compare with this laxity the language of a statute which directs

them to find out what the hypothetical tenant will give for the hereditament rateable—in the present case the "building"—in its actual state; and so far from leaving the valuers at large, directs them to conform with definite regulations framed and approved in accordance with the provisions of the Act. I can find no warrant under the Irish statute for the introduction into the valuation of the element of good-will in any shape or form. The license could, in my opinion, under any system of valuation, be regarded only as an element in "good-will," and I am, therefore, of opinion that the existence of a license cannot be regarded as a matter affecting the actual state of the rateable hereditament within the meaning of the Irish Valuation Act.

GIBSON, J.:—

There are two points for decision in this case. The first is comparatively trivial, and relates to the employment of Messrs. Carroll and Boland to report under section 20 of the Valuation Ireland Act, 1852. They were employed in making the revised valuation in respect of other premises, not Armstrong's. In my opinion, what the section forbids is the employment of valuators concerned in making the particular valuation under appeal, and the objection fails. I think also the point should be deemed to have been waived, if the statement in paragraph 8 of the case is accurate. Whether the provision in section 20 is directory, or goes to the jurisdiction of the Commissioner, I do not now decide. Where an appeal has been taken which could not be affected by the initial irregularity (if any), the appellant, with knowledge of the alleged disqualification, cannot be allowed to gamble with the appeal; and when the decision thereon was against him, rely on the intrinsic incompetence of the Court, *ab initio*, to decide his appeal: *Reg.* v. *Antrim Justices* (1); *R.* v. *Justices of Richmond* (2); *Reg.* v. *Salop Justices* (3).

The main question argued is of immense financial and legal importance. Are publichouses to be valued with regard to, or without regard to, their licenses? The solution of the problem largely depends on whether the Irish Valuation Law in any substantial particular differs from the English Valuation Code,

(1) [1895] 2 I. R. 603. (2) 8 Cox, 314. (3) 2 E. & E. 386.

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under which licensed premises are valued as such. I shall consider —(1) the English statutes and the decisions thereon; (2) the Irish statutes; (3) the Irish decisions.

I. Previous to the year 1840 (3 & 4 Vict. c. 89) there was a marked distinction in the rating law of England and Ireland. Under the 43 Eliz. c. 2, there were two classes of persons liable to be rated for the relief of the poor—inhabitants according to their ability, and occupiers of real property. As to the former class there were many conflicting decisions (which will be found in Pratt's edition of Bott), but in practice, when the Parochial Assessment Act (6 & 7 Wm. 4, c. 96) was passed, inhabitants were only rated in respect of stock-in-trade and ships. As to occupiers of land, the practice was settled long before the statute; and the value was estimated at the rent which a tenant would give, paying poor-rate and expenses of repair and maintenance: *R.* v. *Lower Mitton* (1); *R.* v. *Attwood* (2). One of the last cases before the Act of 1836 was *Adames' Case* (3), decided in 1832, where Parke, J., laid down the then principles of valuation, which substantially agree with the rule in the statute. It was a fundamental principle of rating that equality should be preserved, but to secure that equality certain differences in modes of valuing different hereditaments, *e.g.* lands, collieries, and buildings, were allowed: *R.* v. *Tomlinson* (4); *R.* v. *Brograve* (5).

The express object of the Act of 1836 was to establish one uniform mode of rating for the relief of the poor; it prohibits any rate not made "upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year free of all usual tenants' rates and taxes, and tithe commutation rentcharge (if any), and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses (if any) necessary to maintain them in a state to command such rent." There is a proviso which purports to preserve the principles or different relative liabilities (if any) according to which "different kinds of hereditaments are now by law rateable." This proviso had (it was argued) the effect of keeping

(1) 9 B. & C. at p. 819. (2) 6 B. & C. 277. (3) 4 B. & Ad. 61.
(4) 9 B. & C. 163. (5) 4 Burr. 2491.

intact the previous liability of stock-in-trade and personalty to be rated, and all the decisions on the statute must be (it is said) so understood. Whatever be the explanation of the proviso, which Denman, C.J., in *Reg.* v. *Capel* (1), described as very inartificial, loose, and difficult—whether it was to protect tithes, as counsel there suggested in argument (p. 408), or to maintain certain differential principles or liabilities (if any) *ex abundanti cautela*, the proviso must refer to something included in the enacting part (p. 409), and it is confined to hereditaments. In no case that I am aware of has the proviso been referred to as in any way affecting the rent at which the hereditament might reasonably be expected to let from year to year: *Staley's Case* (2).

In *Reg.* v. *Lumsdaine* (3) it was held that the statute affected only hereditaments, and did not alter the previous direct liability of inhabitants to be rated in respect of personal property such as stock-in-trade. It was probably in consequence of this decision that 3 & 4 Vict. c. 89, abolishing such rating, was passed. It is urged that the cases on the standard of value being the rent payable by the hypothetical tenant, are founded on a confused and ineradicable impression that the hereditament included the stock-in-trade and profits. This argument is baseless. The liability of stock-in-trade was essentially different from the liability of the hereditament to which the letting test alone was applicable. All the decisions for the last sixty years are founded on the true construction of the statute of 1836 as it stands. It is negative in terms, and excludes expressly (as Lord Halsbury says, in *The Mersey Docks Case* (4)), trade profits from the valuation. The construction of the statute of 1836 is settled beyond controversy by such decisions as *The Mersey Docks Case* (5); *Cartwright's Case* (6); *The Erith Case* (7); *Dobbs' Case* (8); *The Grand Junction Railway Case* (9); *Allison's Case* (10); *The London and North-Western Railway Case* (11). Annual value, which *prima facie* means net value (*Dobbs' Case* (8)), is a question of fact and not of law: *Mersey Docks*

(1) 12 A. & E. at pp. 411, 412.
(2) 5 B. & S. at p. 512.
(3) 10 A. & E. 157.
(4) [1901] A. C. 180. (5) *Ib.* 175.
(6) [1900] A. C. 150.
(7) [1893] A. C. 562.
(8) 9 A. C. 49.
(9) 4 Q. B. at pp. 38, 39, 41.
(10) 4 E. & B. 13.
(11) L. R. 9 Q. B. 134, at pp. 144–5.

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Case (1); and elaborate calculations as to cost of building, &c., complicate and embarrass the problem: *ibid.* p. 181. Rent is only presumptive evidence, and the value may be more or less than the actual rent: *R.* v. *Skingle* (2); *Clark's Case* (3). Profits are not rateable, but the capacity of the hereditament, its situation, neighbourhood, and the kind of business for which it is suited, including the business done on the premises, may be considered in the estimate of what a hypothetical tenant would give. Hence profits permanently connected with the hereditament, and not the result of accidental or personal considerations, may be used as a test or element which might influence the hypothetical tenant. A racecourse: *Reg.* v. *Verrall* (4); a refreshment room: *Clark's Case* (3); lairages: *The Mersey Docks Case* (5); *The Poplar Case* (6): would depend for their value largely on the volume of the business done. A steady and continuous decline of profits not attributable to accidental fluctuation might justify a reduction of valuation, just as a permanent rise would warrant an increase of such valuation: *Clark's Case* (3); *The Poplar Case* (6); *The St. Mary's, Islington, Case* (7). That situation affects value is obvious. The same identical business house transferred from Regent-street to Soho would be of less value. Two ends of even the same street may represent different business values. One end of Oxford-street, London, or Sackville-street, Dublin, or one side of a square like Stephen's-green, may have a lower letting value than the other end or side. Why? Because the profit would be lower. The actual profit depending on the fluctuations of trade, or on personal energy or success, is immaterial; but so far as profit can properly be attributed to the earning power of the hereditament in its actual state, it is a legitimate element in valuation.

The strongest illustration of the principle is *The Longbenton Case* (8), where machinery not attached to a mill, but forming part of the works, taken as a whole, and intended to remain connected with the premises, was held to be an element in the valuation of

(1) [1901] A. C. at p. 180.
(2) 7 T. R. 549.
(3) 6 Q. B. D. 139.
(4) 1 Q. B. D. 9.
(5) [1901] A. C. 175.
(6) 13 Q. B. D. 364.
(7) 19 Q. B. D. 529.
(8) 18 Q. B. D. 81.

the mill. This decision, which fortunately does not apply to Ireland or Scotland, where machinery is expressly excluded by statute law, has been much criticised, and it is not easy to see how the *quantum* of addition arising from the presence of such machinery is to be calculated. The fact that our legislation, so far back as 6 & 7 Wm. 4, c. 84, s. 13, prohibits the inclusion of machinery in valuation might suggest that it was considered that but for such provision the valuation of mills might be influenced by such machinery.

I now turn to the valuation of publichouses, which seem to me to fall within the general principle and not to come under any special or exceptional rule of valuation. If there was free trade in publichouses and no statutory license was required, the value of the particular publichouse, like that of an ordinary shop, would depend on its capacity and situation and the likelihood of good business in connexion with the premises. The fact that a publichouse is a kind of limited monopoly merely increases its value. Whether the publichouse is held by the owner in fee, or is let as such to a tenant, or the license is acquired by the tenant, the problem is the same—what is the immediate annual value of the occupation? The argument that a tenant might, by getting a license, prejudice his landlord by increasing rates which he could deduct is of no weight. The landlord must take the risk, if not guarded against by contract. There are many cases where the valuation has been increased by the tenant's action, *e.g. Gloster* v. *Murphy* (1) where the value was raised from £5 10*s.* to £24.

In 1815, as appears from the judgment of Le Blanc, J., in *R.* v. *Bradford* (2), publichouses were treated as recognised subjects of rating. There a canteen was held rateable on the same principle. From this date no question has ever been raised as to the annual value of licensed premises including the license. *Allison's Case* (3), recognised in *The London and North-Western Railway Case* (4); *The West Middlesex Water Works Case* (5), and *Cartwright's Case* (6), conclusively establish the law. There was a difference of opinion between the Queen's Bench and Common Pleas on the

(1) [1894] 2 I. R. 49.
(2) 4 M. & S. at p. 323.
(3) 4 E. & B. 13.
(4) L. R. 9 Q. B. at p. 145.
(5) 14 Q. B. D. 529.
(6) [1900] A. C. 150.

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question whether a brewery owning tied houses could be deemed thereby increased in value; but it was never doubted that the publichouses must be rated with regard to their licensed character.

The ingenuity of counsel has suggested many objections to valuing licensed premises as such: for example, the personal character of the license, its temporary character, and diminishing value if there were convictions recorded. All these difficulties have been treated as negligible by the English Judges. The premises are valued in their actual present condition with the license attached. The earning capacity of the premises as they stand is what is considered, irrespective of the personality of the licenseholder. Some one must hold the license, but the value of the publichouse does not depend on the accidental competence or incompetence of the publican, but on the earning power of the licensed hereditament. It is therefore inaccurate, I think, to say that good-will is considered in the valuation, if good-will means the advantage resulting from the occupier's personal connexion with the businesss carried on in the publichouse.

The only substantial difference between English and Irish licensing law is that with us a publichouse is more valuable, as there is here a qualified right to insist on a renewal and a transfer. There is no property in a license: *Kelly* v. *Montague* (1); but, undoubtedly, premises with a license are more valuable than those without a license. In estimating the value of a testator's assets a publichouse owned by him would be returned at its value as a licensed house *plus* good-will, if any. Why should it be otherwise valued as a hereditament for letting to the hypothetical tenant, omitting, of course, good-will?

I have looked into several statutes *in pari materia*, *e.g.*: the Metropolis Valuation Act, 1869, 32 & 33 Vict. c. 67, s. 4; and I cannot find any one which bears, or has been decided to bear, the meaning that the license was not to be considered in valuation. Different forms of expression are used, but whether the annual value is gross or not, the premises with the license attached are the subject valued.

II. Are the Irish valuation statutes substantially different

(1) 29 L. R. Ir. 429.

from the English legislation? At the time they were enacted the general principle of estimating annual value by the rent which the hypothetical tenant would be expected to pay had been established by such cases as *R.* v. *Adames* (1) quite apart from the Act of 1836, and it must also have been known to the Legislature that publichouses had been for years rated as such.

The Irish valuation enactments before 1852 represent two types—one, like the Poor Law Act, 1 & 2 Vict. c. 56, ss. 63 and 64, enumerates the rateable hereditaments, and defines the annual value of such hereditaments as based on an estimate "of the rent at which one year with another the same might in their actual state be reasonably expected to let from year to year, the probable annual average cost of repairs, insurance, and other expenses (if any) necessary to maintain the hereditaments in their actual state, and all rates, taxes, and public charges, if any (except tithes), being paid by the tenant." This type is followed in 6 & 7 Vict. c. 32, and 9 & 10 Vict. c. 110. The second type of statute is exemplified by such statutes as 7 Geo. 4, c. 62, and 6 & 7 Wm. 4, c. 84. Under these, land is valued according to specified agricultural prices, and houses are valued at the rent for which they could be let from year to year, deducting therefrom one-third. This deduction is also found in 9 & 10 Vict. c. 110, sect. 40. There is no specific provision in these statutes as to the mode of valuing such property as mines, brickfields, sandpits, &c. The Valuation Act of 1852 adopts the tenement valuation when completed under 9 & 10 Vict. c. 110 (sect. 40 of which allows a deduction of one-third from the rent): like 7 Geo. 4, c. 62, it distinguishes between land and houses, directing the annual value of the former to be estimated according to prices of certain agricultural produce, and the valuation of houses and buildings to be made upon an estimate of the net annual value—that is, the rent for which one year with another the same in its actual state might be reasonably expected to let from year to year; the probable average cost of repairs, &c., being paid as in 1 & 2 Vict. c. 56, sect. 64. Sect. 12 specifies the rateable hereditaments; but the Act, though it adopts 9 & 10 Vict. c. 110, contains no rules for ascertaining the net annual value of here-

(1) 4 B. & Ad. 61.

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ditaments, except in the case of land and buildings. How would a mine, a cemetery, like Glasnevin, a brickfield, gravelpits (as in the *Farnham Case* (1)), or a racecourse be valued? If the rules laid down in *Rex* v. *Adames* (2), and previous cases, do not apply, valuation in such cases would be arbitrary. Mr. Justice Andrews, accordingly, in *The Clonbrock Colliery Case* (3), held that the principle of valuation laid down in sect. 64 of the Poor Law Act, founded on ancient and well-settled rules of rating, should be construed to apply to collieries. All other enumerated rateable hereditaments for which no specific mode of valuation is prescribed should apparently be valued in the same way.

These enactments bear a close resemblance to the phraseology of the English statutes, and if the Legislature, which must be taken to have been aware of the existing state of English rating law, intended to make publichouses rateable only as buildings, irrespective of license or business capacity, it is regrettable that it did not mark this radical divergence from English rating law by clear and express language.

The main alleged points of distinction relied on by counsel are as follows:—

1. The Poor Law Act directs hereditaments, and the Valuation Act, 1852, requires houses and buildings, to be valued "in their actual state."

2. The hereditaments are enumerated specifically as the rateable hereditaments; none others are rateable, and buildings only can be rated as such.

3. The instructions to valuers were issued under the Act of 1852, sect. 8, which follows previous precedents—7 Geo. 4, c. 62, sect. 6; 9 & 10 Vict. c. 110, sect. 8—and the contemporaneous exposition of the statute contained in these instructions has established a practice which it is too late now to disturb.

4. The proviso in the Act of 1836, sect. 1, is not found in the Irish statutes, and such proviso is the basis of the English construction of that Act.

5. The Act of 1880, 43 & 44 Vict. c. 20, sect. 43, sub-sect. 7, is a declaration or recognition that under the Valuation Acts a

(1) [1901] 1 Q. B. 272. (2) 4 B. & Ad. 61. (3) [1896] 2 I. R. 560.

publichouse could be, and then was, properly valued as a mere building without regard to the license.

6. Some reference was made to the difference of the Licensing Laws in England and Ireland; but as the only difference is one which makes Hibernian publichouses more valuable than those in England, it would be waste of time to examine such a distinction in detail.

I now take up the five alleged points on which it is said that the rent to be paid by the hypothetical tenant of an Irish publichouse in its actual state must be estimated exclusively of the license, and must be deemed to be paid for the building only.

1. The ancient and established rule in rating law was to rate on the existing or actual state of the hereditament: Ryde (p. 145), Castle (pp. 151, 153), Boyle & Davies (pp. 200, 201), in the last editions of their text-books all so lay down. Thus in *Westbrook's Case* (1), Lord Denman says:—"The rate is always imposed with reference to the existing value; whether temporary or enduring is immaterial." Blackburn, J.'s, judgment in *Staley's Case* (2) is to the same effect. The opinion of Cockburn, C.J., in *Reg.* v. *Fletton* (3) is the same. In *The Longbenton Case* (4) the Attorney-General, in his argument, says: "The subject of rating is not merely the land pure and simple, it is the hereditament in its existing state at the time of rating." At p. 93, Lindley, L.J., adopts this: "The statute did not mean that they (the hereditaments) should be looked at as so much land, but that they should be taken as they are found."

The words "in their actual state" were introduced into the Irish Poor Law Act (where they apply to all hereditaments), not to restrict the valuation of such hereditaments to their structural character, but to express clearly for the guidance of those called on to administer a new system the established and ancient rule applied in valuation. Several of the enumerated hereditaments must admittedly be valued with regard to their profit-earning capacity, *e.g.* railways, &c.: see Griffith's instructions, p. 47, Rule 168: "In the case of railways the rateable hereditament is the land which is to be valued in its existing state as that of a railway

(1) 10 Q. B. at p. 203.
(2) 5 B. & S. at pp. 513, 514.
(3) 3 E. & E. 450.
(4) 18 Q. B. D. at p. 86.

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at the rent it would fetch under the conditions stated in the Act. The profits are not directly rateable themselves, but they enter most materially into the question of the amount of the rate upon the land by affecting the rent which it would fetch . . . not simply as land, but as a railway." It will be seen that the writer here construes "actual state" as I do; he applies to railways the hypothetical rent-standard prescribed by section 64 of the Poor Law Act, but not mentioned in section 12 of the Valuation Act. If the words "actual state" were not in the statute at all, probably the same principle would be implied. Similarly, the Act of 1836, section 1, does little more than establish uniformity in relation to the application of what had been fixed by the cases as the rule for assessing annual value. Why the words "actual state" and the reference to the hypothetical tenant's rent occur in the Valuation Act only in reference to houses and buildings, I cannot say. Andrews, J., in *The Clonbrock Case* (1) held that mines must by implication be valued according to the hypothetical tenant's rent, though the Valuation Act contained no such direction. Whatever "actual state" means in the Poor Law Act, it must also mean in the Valuation Act. In the former Act the words must include an estimate of profits in the case of many of the hereditaments. The words "repairs, &c., necessary to maintain the hereditament in its actual state" have the same effect as the words in the Act of 1836, section 1, "necessary to maintain them in a state to command such rent." The phraseology of section 64 of the Poor Law Act, so far from indicating an intention to make Irish Valuation differ from English, demonstrates that the same fundamental principles were intended to be applied and followed. The words "actual state" were used because their effect was well known, and embodied what was settled law. The Act 1 & 2 Vict. c. 56 was the first real Irish Poor Law Act, and hence its enumeration of rateable hereditaments and its rules as to valuation.

The argument that "actual state" refers only to structural condition of the premises would eliminate a leading element of value, namely, situation—an element peculiarly liable to change.

(1) [1896] 2 I. R. 560.

The same house in a good business locality may be worth a large sum, and in the same actual state in a few years may drop in value if the tide of fashion and business makes a new channel elsewhere.

2. Assuming that the rateable hereditaments, enumerated in section 63 of the Poor Law Act and in section 12 of the Valuation Act, 1852, were there intended to be exhaustive, as is probable (see *Alma's Case* (1) as to the operation of the several descriptions), I fail to see that such enumeration in section 63 of the former Act, or the description of house or building in section 11 of the latter statute, alters the rent to be paid by the hypothetical tenant under section 64 of the former Act or section 11 of the latter, or necessarily excludes the license and business capacity of the premises from consideration. House or building includes a shop or factory, which admittedly bears a higher value than a private house: and locality must be considered. Building is used as a wide term to include edifices used for any purpose, but the character of the building and its capacity for earning are essential elements in the valuation, which must be made on its existing condition or state. If "hereditament" embraces a licensed house as it stands, "house" also embraces it, and so does "building."

3. The instructions issued by Sir R. Griffith, with the sanction of the Lord Lieutenant, were of an advisory character (to use Lord Halsbury's expression in *The Mersey Docks Case* (2)), and if and so far as they may be found to conflict with the Act itself, they must be disregarded. I think they have been misunderstood in the argument before us, and perhaps misapplied in practice. All the ordinary factors of value such as situation and profits are recognized, and the remarks applicable to the ascertainment of the value of one factor, the masonry, have been, regardless of context, construed as excluding all the other factors.

The instructions do not profess to cover everything. How would a cemetery, like Glasnevin, a theatre, music hall, hotel, railway refreshment-room, or dock, be valued under the regulations? The rules, as working rules, may have served a useful purpose once,

(1) I. R. 10 C. L. 476. (2) [1901] A. C. 179.

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when a novel system was being launched; but Lord Halsbury has expressed the view that elaborate rules for determining a question of business fact embarrass and complicate the solution. Some of the directions nowadays would seem wholly wrong. The conception of monster shops did not exist. Accordingly, in Rule 218, it is laid down that a house with two shops must be much more valuable than the same bulk of house with one. Similarly, the author treats value from market-proximity, as measured by a kind of fixed percentage. I have not studied the working regulations of administration contained in Sir R. Griffith's little book with much care, as they cannot control or vary the statutory standard for estimating annual value; but so far as I have read the manual, it certainly does not bear out the notion that consideration of earning power was intended to be excluded. In the case of railways, canals, mines, and fisheries, profits were recognized as an essential factor in assessing the annual value. Again, shops were treated as more valuable than private houses, and locality was described as a material element. If shops are, or may be, more valuable than ordinary houses, their value must vary according to neighbourhood and facilities of trade. I doubt if such questions as have been discussed before us ever occurred to the framer of the directions. Theatres, hotels, &c., are not shops. How were they to be valued? Had the author considered and formed an opinion whether all shops of the same dimensions must be put at the same value; whether there might not be a difference in value according to the particular kind of use for which the premises were fitted. For the above reasons I cannot accept the view that Sir R. Griffith's advisory directions were intended to, or could, conclude for all time the proper mode of applying the statutory standard for ascertaining annual value. If, and so far as, they do not agree with that standard, they can have no effect.

Counsel allege that under these rules a practice has grown up to value publichouses as mere buildings on a brick-and-mortar calculation. Whether this is so or not I do not know. I can hardly credit that if a shop is (according to the regulations) to be valued higher than an ordinary house, a publichouse is not to be valued at least as a kind of shop. Surely a fashionable hotel with a license ought not to be valued as a private residence. Has

a spirit grocer's house or a railway refreshment-saloon been rated on its value for business purposes? Has a hotel with a license been valued as worth no more than a temperance hotel? If the rent payable by the hypothetical tenant is a question of fact to be determined according to the circumstances of the hereditament at the time of valuation, that question cannot be pre-determined and concluded long beforehand by the construction of cast-iron formulæ, not merely for the mode of valuation, but defining and narrowing the essential principles of valuation.

Supposing the practice to be, as stated, to value licensed premises as mere buildings, and that such a practice has existed from the year 1852, though it may cause some immediate inconvenience to disturb it, if it has proceeded on an erroneous construction of the statute, this Court is not precluded by lapse of time from correcting it: *Hamilton* v. *Baker* (1). In *The Mersey Docks Case* (2) a large body of authority commencing in 1792 was overruled as founded on a mistaken interpretation of the statute of Elizabeth. In *Clitheroe's Case* (3), though the decision was in favour of the publican, it was not questioned that if the previous practice was contrary to the statute, the latter must prevail. One of the strongest cases on this subject is *Re M'Naul's Estate* (4), which overruled *Billing* v. *Welch* (5), a conveyancing decision which had been received without question for many years, and on which many titles had been doubtless accepted. In the present case the meaning of the English legislation has been ascertained by a course of continuous and unbroken decisions, ending with several in the House of Lords. If our legislation is identical, we must adopt the same construction. There is no Irish decision indicating any sanction of the supposed practice; so far as they go the authorities are the other way.

4. The proviso at the end of section 1 of the Act of 1836 is relied on as showing that the atmosphere of the old authorities on 43 Eliz. c. 62, was carried into and influenced the construction of the later Act. Whatever may be the explanation or effect of the proviso, it is restricted to hereditaments, and in no decision on the

(1) 14 A. C. at p. 222.
(2) 11 H. L. Cas. 443.
(3) I. R. 11 C. L. 412.
(4) [1902] 1 I. R. 114.
(5) I. R. 6 C. L. 88.

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Act has it been relied on as assisting the ascertainment of the hypothetical tenant's rent. At the time the Act became law there were two distinct systems of rating, on personalty, and on occupation, and that for valuing the occupation of hereditaments had been settled by such cases as *Adames' Case* (1). Occupation value was unaffected by the presence of stock-in-trade, which was the subject of separate rating. The decisions are not founded on any confusion between the two. In 1844 Lord Denman, who had decided *Reg.* v. *Lumsdaine* (2), said :—"Two propositions are equally true, that the rate is not to be imposed in respect of the profits of the trade, and that it is to be imposed in respect of the value of occupation": *The Queen* v. *The Grand Junction Railway Company* (3). All the authorities for over half a century purport to proceed on the true construction of the very words of the section, and they cannot be explained away by the suggestion of the abiding effects of an Elizabethan atmosphere.

5. The main argument in support of the trade view was based on 43 & 44 Vict. c. 20, sect. 43, sub-sect. 7, which (it is said) is a statutory recognition of the existence and propriety of the existing practice. That statute applies to all the United Kingdom, and is for excise purposes only; it is not a Valuation Act. Section 43 makes the duty depend on the annual value of the dwelling-house in which the retailer resides and sells spirits. The statute does not prescribe how such value is to be ascertained. If the annual value in England is estimated on the premises as licensed, the annual value in Ireland should be calculated apparently on the same principle. Under section 43, sub-sect. 4, in the case of premises of the value of £50 and upwards, adapted for and mainly used as a hotel, the amount of duty is limited to £20. The value here spoken of is not ascertained under the Valuation Act. The sub-section which refers to "the value" contemplates that if in England the premises should be valued as licensed, in Ireland the same assessment should be adopted in principle. The provision relied on by Armstrong's counsel is contained in sub-sect. 7. To interpret it we have to ascertain what was the existing system of valuation for excise purposes. This is found in 6 Geo. 4, c. 81, sect. 5. The value mentioned in section 43 of the Act of 1880 is

(1) 4 B. & Ad. 61. (2) 10 A. & E. 157. (3) 4 Q. B. at p. 41.

assessed for the United Kingdom apparently under that section. The statute relates to England and Ireland alike. Inhabited house duty was unknown in Ireland, and hence the Commissioners were entrusted with the absolute power of determining the true rent or annual value. Under the Inhabited House Duty Act it would appear that the full annual value was different from the net poor law annual value under the Act of 1836, and that a public-house should be valued at the rent it would bring as a publichouse free from any tie: *Walker* v. *Brisley* (1). If so, it would seem that the Commissioners in Ireland might value and assess on the same principle, that is, full value as distinct from net value.

To return to the sub-section: its clear purpose is to limit the powers of the Excise, under the Act of 1825, to value the public-house at its full value as such, by prescribing as a maximum limit not to be exceeded the value assigned in the valuation in force—that is in force for the time being—under the Act of 1852, with the addition of 20 per cent. There is an appeal given against the Commissioner's valuation. The right of appeal is not conditional on the tenement valuation being exceeded; and theoretically it would be possible that on appeal against a valuation under the Act of 1825, the value might be fixed at, or even under, the tenement valuation. It will be observed that sub-section 7 does not split up the valuation, and assign so much for buildings and so much for license. The valuation is entire, and is made by the Commissioners under their original jurisdiction to value the licensed premises as they stand, and not in any way under the Valuation Act of 1852.

The true explanation of this enactment is this. It was well known that in Ireland tenement valuation was under the full value, and in the case of houses a deduction of one-third was expressly imposed by the earlier statutes, such as 7 Geo. 4, c. 62, sect. 7; 6 & 7 Wm. 4, c. 84, sect. 10; 9 & 10 Vict. c. 110, sect. 40. This may be one explanation. Another plausible one is suggested by *Walker's Case* (1). The tenement valuation was on the net value; and the full value, or true annual value, under

(1) [1900] 2 Q. B. 735.

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the Act of 1825 was different. Hence in limiting the powers to assess at full value, it was natural to allow an addition to the tenement valuation, which was net. In any view the Act of 1880 leaves the jurisdiction under the statute of 1825 in full force, imposing only a maximum limit. If, under the original Act of 1825, the value was calculated on the licensed premises as such, it is impossible to draw any inference that the introduction of the Valuation Act as a limiting standard imports a declaration or recognition that under the latter Act a publichouse must be valued as a mere edifice apart from its license. The only obvious inference would be that the authority of the Excise under the Act of 1825 was to be restrained to a certain superior limit, but that the Valuation Act assessment might be too low, and 20 per cent., therefore, might be added subject to appeal. As on such appeal the entire 20 per cent., if added, might be struck off, it would seem to follow that the 20 per cent. cannot be for the mere license as a new rateable unit. The sub-section supplies an argument that the license was not, under the Valuation Act, dissociated from the hereditament; it certainly affords no argument for Armstrong's contention.

All the points of attempted distinction between the rents of the hypothetical tenant in England and Ireland appear to fail. Under the Act of 1852 the use to which premises may be put is material; railways, canals, docks, &c., must admittedly be valued with regard to earning power, and profits must be considered in estimating the rent value. So Sir R. Griffith directly states. If the practice be as counsel state, it is contrary to the spirit of Sir R. Griffith's instructions, and introduces an unequal and arbitrary assessment, self-contradictory in principle and contrary to the specific prescribed standard.

III. The Irish authorities are few, but they tend to support my conclusion. In *The Banbridge Union Case* (1) Crampton, J., was strongly of opinion that the Irish Poor Law Act was substantially the same as the statute of 1836; Moore, J., agreed, without however expressing any concluded opinion. Lefroy, C.J., held otherwise, thinking that by reason of the statute of Elizabeth the English

(1) 4 Ir. C. L. R. 394.

law and decisions were inapplicable to this country. I have endeavoured to show that he was wrong. The next authority is *The Clonbrock Case* (1), where Andrews and Murphy, JJ., applied to collieries the principle of valuation adopted in England, notwithstanding that our Valuation Act laid down no such principle. The judgment is largely based on English decisions, and is important as showing the substantial identity in the principles of valuation in the two countries. A small indication pointing the same way is found in the speech of Lord Morris in *Cartwright's Case* (2). He was thoroughly versed in Irish Valuation law, and if publichouses were not valued as such in Ireland, it might have been expected that he would have adverted to this difference. In *Switzer's Case* (3), at p. 291, Palles, C.B., mentions the question without, however, expressing any opinion. *Alma* v. *Corporation of Dublin* (4) does not deal with the point now before us, but it contains an instructive commentary on the meaning of the words "lands" and "easements" in the Valuation Act, and shows how waterworks are a rateable hereditament. The above cases are not direct authorities on the question in hand, but they seem to me favourable to my construction.

A minor point raised in argument must also be decided against the appellant. The license was not separately valued. The hereditament unlicensed was valued at £115; licensed at £170. I fail to see how otherwise the distinction could be expressed. In each case the hypothetical rent is single and entire. This objection is quite unsupported by principle or authority.

In *The Belfast Case* (5), at p. 538, I expressed regret that the decision of this Court was final and without appeal. The Act 50 Vict. c. 17, gives a partial remedy, allowing revision by our Court of Appeal. In a case like this, which goes to the root-principles of valuation, and affects such vast interests, it appears unfortunate that the right of appeal to the supreme appellate tribunal, which exists in England, should be withheld from Ireland. The only way of obtaining the decision of the House of Lords would be by bringing an action for a rate (as in *The Derry Bridge*

(1) [1896] 2 I. R. 560.
(2) [1900] A. C. 150.
(3) [1902] 2 I. R. 275.
(4) I. R. 10 C. L. 476.
(5) [1897] 2 I. R. 516.

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Case (1) or, possibly, by an injunction suit against the Commissioner or rating authority. Such proceeding, if available (as to which I express no opinion), would supply only an indirect, circuitous, and dilatory remedy, and the remedy, if available, would be one-sided, as it would only affect a case where the valuation was supported, not where it was quashed. There ought to be some means, whether guarded by leave of the Court of Appeal or not, whereby such a controversy as the present could be determined at once and finally by the House of Lords.

LORD O'BRIEN, L.C.J. :—

This case presents for our determination a question of very considerable importance, I might say very great importance. Putting aside mere verbal criticisms as to the form of the case, I come to the substance of what was argued before us. The question is this: In valuing a publichouse under the Irish Valuation Act, the 15 & 16 Vict. c. 63, is regard to be had to the license which authorises the sale of spirituous liquor therein, or is the house to be regarded as a mere material structure, situated in a certain locality, and suitable by reason of the plan of its construction for the purpose of carrying on the business of publican? Is the enhanced or added value of the premises, which is undoubtedly produced by the license, to be excluded from the rateable value? It is conceded that plan of construction, physical dimensions, and situation, may be regarded; but it is very strenuously argued that regard cannot be had to the license attaching to the house; that, in fact, the house is not to be valued as a licensed house, but as a mere structure. I asked counsel for the appellant, at an early stage of the argument, did they contend that that, namely the license, which made the house in question a publichouse, and which clearly enhanced the value of the physical structure, could not be taken into consideration in valuing it. Did they contend that the enhanced value which was due to the license could not be taken into consideration in estimating the rateable value? The answer was that they did so contend. Counsel for the appellant could not deny that the volume

(1) I. R. 1 C. L. 283; 2 C. L. 577.

of the business done by the publican in the house in question could be taken into consideration with a view to ascertaining its structural capabilities; but they contended, nevertheless, that no regard should be had to the license, without which no such business could at all be carried on therein. I ventured also to ask if the true test in the solution of the problem relative to the valuation of a publichouse is what Lord Halsbury said it was, namely, what could reasonably affect the mind of an intending tenant, might not the fact that a license was attached to the house be taken into consideration? The answer to this question was also in the negative. These contentions made on behalf of the appellant appeared to me to lead to great anomalies, and on consideration I retain the opinion which I formed at an early stage of the discussion, that they were not well-founded. The result at which I have arrived may be stated in a sentence, that this case is covered by *Cartwright's Case* (1) in the House of Lords, there being, in my opinion, no difference in the law applicable to both countries. It is not denied that in England in the valuation of a publichouse regard must be had to the license. Mr. Ryde tells us in the second edition of his useful work on Rating what the practice in England is. He says, at p. 450, "Regard must be had to the license." This statement of the practice by Mr. Ryde is quite correct. It is entirely borne out by the decision in *Cartwright's Case* (1) in the House of Lords. This decision is, of course, of the very highest authority. It has the effect of an Act of Parliament—of a declaratory Act. The case came before the Courts in England on an appeal from the decision of an arbitrator with reference to the valuation of a publichouse. The arbitrator stated, by way of special case for the information of the appellate tribunal, the course of proceedings before him, the admissions made, and the contentions of the respective parties. He says the premises were a "fully licensed publichouse," the very description of the premises before us. He said also (see [1899] 1 Q. B., p. 668): "It was admitted before me that the existence of the license, under which the publichouse is occupied as such, materially increased the rent which any tenant would be

(1) [1900] A. C. 150.

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willing to pay for the publichouse, and I find as a fact that such increase in rent is caused by the possibility of carrying on a profitable trade which cannot be carried on on premises which are not so licensed." This is really the condition of things in the present case. It is what, in substance, is found by the Recorder of Belfast. Later on the arbitrator (at p. 670) states what the contentions were. "The appellant" (he said) "contended that in valuing the publichouse for the purpose of the poor-rate, the existence of the license must be left out of consideration, on the ground that the license is a personal privilege granted to the occupier, and does not increase the value of the hereditament itself." This argument was also presented here. How did the arbitrator deal with it? He refused to adopt it. "I hold," he said (see p. 671, clause 17), "that the first contention of the applicant is wrong in law." That is to say, that the argument principally relied on here was wrong in law. Well, what took place? The arbitrator's view was affirmed by the Divisional Court, by the Court of Appeal, and the House of Lords. He plainly held that the license did increase the value of the hereditament, and then and there by reason of so holding he placed on the hereditament an added value which was to be deducted in case he was held to be wrong (see clause 17 at p. 671).

Lord Halsbury, L.C., in giving judgment in the Court of Appeal, said:—"I am of opinion that this appeal must be dismissed. The problem is to ascertain, according to the statute, what a tenant from year to year might reasonably be expected to give as rent. For the solution of that problem it appears to me that, apart from the decisions, as to which I will say a word presently, all that could reasonably affect the mind of the intending tenant ought to be considered." Can it, I ask, be contended with any show of reason that the existence of a license would not reasonably affect the mind of an intending tenant? Would not the very thing which attaches the stamp of legality to the premises, enables the business to be carried on, saves the proprietor from the liability of being sent to gaol for unlawful trading, and the premises themselves from being raided by the police, and the business from being broken up, affect the mind of any reasonable man?

What Lord Justice Collins said, at page 679 of the report, may, I think, be referred to. No doubt, he was not there dealing with the precise point before us; but his observations are not irrelevant. He said:—"The facilities incident to the hereditament itself are absolutely germane to the matter." A license is not a mere facility. It is a *sine quâ non* so far as carrying on the business is concerned, the existence of which gives the premises their statutory description of "licensed premises." The Lord Justice also said, "Surely the business that has been done is the most important factor in arriving at a conclusion." If this be so, as it undoubtedly is, can it be said that no regard is to be had to the license, without which no business at all could be done. Lord Macnaghten, in giving judgment in the House of Lords in *Cartwright's Case* (1), said:—"It appears to me that the volume of business done in a public-house, as apparent to the man in the street—if I may use such an expression—is the very first thing that a tenant proposing to make an offer for such a house would take into consideration." Lord Macnaghten uses the expression "publichouse." He deals with the house as a publichouse. He deals with it such as it was—not as a mere brick-and-mortar edifice. "Publichouse" is equivalent to "licensed premises," which is the very description of the house in question in Schedule A attached to the case stated by the Recorder of Belfast. Lord Brampton in the same case is reported to have said (page 160):—"The house itself stands at the corner of the street, a very eligible position for a publichouse to stand in. It is admirably adapted for the purpose of doing a large business, and it has a *license*." Lord Brampton thus expressly refers to the license.

Perhaps I have dwelt too long on *Cartwright's Case* (1), because it is not denied, it is in fact admitted, that in England in the valuation of a publichouse regard is had to the license, but it is said that the law in England and Ireland is different; that there is a difference between the Parochial Assessment Act in England, and the Valuation Act, 1852, in this country; that in England there was a long traditional practice which created what was vaguely styled an "atmosphere" which in

(1) [1900] A. C. at p. 153.

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some way gave colour to the Parochial Assessment Act, and rendered the word hereditament in that Act more malleable and comprehensive than the word hereditament or messuage in the Irish Act; that the word hereditament in the English Act might be read as a house with a license attached to it, but that the Irish Act should be rigidly construed, and that the words house and building therein meant a bare physical material structure. I can find no reference to traditional practice or atmosphere in *Cartwright's Case* (1). A publichouse was plainly dealt with there as a hereditament equipped with a license, the occupation of which hereditament derived an additional value from the license. The proviso to the first section of the Parochial Assessment Act was referred to by appellant's counsel. I had better give the very words, because the proviso is very obscure, so obscure that Lord Denman said it was likely to have no operation—the reason, I think, which caused its omission from the Irish Act. The words are :—" That nothing herein contained shall be construed to alter or affect the principles or different relative liabilities (*if any*) according to which different kinds of hereditaments are now by law rateable." There are the words, and they are certainly obscure enough. I think they leave us where we were. This proviso was referred to at some length in the case of *The Queen* v. *Capel* (2), where Lord Denman seems to have laboured in vain to ascertain its meaning. English text-writers tell us what the object of the introduction of this proviso was, namely, to preserve for the clergy an advantage they were supposed to have gained by the decision in *Joddrell's Case* (3)—a matter wholly irrelevant to the present discussion : see 2nd edition of Ryde on Rating, pp. 428, 429.

The difficulty, however of judicial interpretation remains the same. This proviso appears to me—I speak with the same embarrassment that Lord Denman experienced—to have been intended to apply only where there is a question of the comparison of the relative liabilities of different kinds of hereditaments, such as existed in *Joddrell's Case* (3), and not to have been intended to apply to a discussion in regard to the valuation of a single heredi-

(1) [1900] A. C. 150. (2) 12 A. & E. 382. (3) 1 B. & Ad. 403.

tament by itself with which the body or enacting part of the section is conversant. But if this was the intention of the Legislature, it is, nevertheless, very difficult to see that it in any way qualifies or affects the body or enacting part of the section. It leaves principles and relative liabilities as they are, and I can see nothing in the history of those principles or relative liabilities to prevent a publichouse being regarded as a single *totum* equipped with a license. In my opinion this proviso has no application at all to the question before us, and seems never to have been referred to in any kindred case—at least in any of the cases cited at the Bar. It was not once mentioned in *Cartwright's Case* (1), either in the Court of Appeal or House of Lords.

Passing away then from this proviso I come to the other or second distinction which was said to exist between the English and Irish statutes. It is argued that there is a substantial difference between them, because the words "actual state" are found in the one statute, and not in the other. These words "actual state" do not certainly assist the appellants. The Recorder of Belfast seems, I think rightly, to have thought that they militated against the construction contended for by them. The words "actual state" were introduced to ensure that the hereditament or building was valued such as it was, *rebus sic stantibus*, and to prevent speculation as to mere contingencies, speculations as to what the value of a house might be under conditions different from those subsisting. Lord Blackburn, then Mr. Justice Blackburn, said, in giving judgment in the case of *Staley* v. *Overseers of Castleton* (2), that the Legislature intended that the rate should be made on the rent which might be reasonably expected from a tenant who took the property from year to year, *rebus sic stantibus*; and to the same effect had several Judges before him expressed themselves. In order to ensure that the law should in Ireland be administered on the same basis, the words "actual state" were introduced into the Irish Act. The house should be dealt with such as it was, a publichouse with a license, and not as it was not, a mere structure without one. "The true principle," said Chief Justice Cockburn (see *The Queen* v. *Fletton* (3)),

(1) [1900] A. C. 150. (2) 5 B. & S. 505. (3) 3 E. & E. 450.

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some way gave colour to the Parochial Assessment Act, and rendered the word hereditament in that Act more malleable and comprehensive than the word hereditament or messuage in the Irish Act; that the word hereditament in the English Act might be read as a house with a license attached to it, but that the Irish Act should be rigidly construed, and that the words house and building therein meant a bare physical material structure. I can find no reference to traditional practice or atmosphere in *Cartwright's Case* (1). A publichouse was plainly dealt with there as a hereditament equipped with a license, the occupation of which hereditament derived an additional value from the license. The proviso to the first section of the Parochial Assessment Act was referred to by appellant's counsel. I had better give the very words, because the proviso is very obscure, so obscure that Lord Denman said it was likely to have no operation—the reason, I think, which caused its omission from the Irish Act. The words are:—"That nothing herein contained shall be construed to alter or affect the principles or different relative liabilities (*if any*) according to which different kinds of hereditaments are now by law rateable." There are the words, and they are certainly obscure enough. I think they leave us where we were. This proviso was referred to at some length in the case of *The Queen* v. *Capel* (2), where Lord Denman seems to have laboured in vain to ascertain its meaning. English text-writers tell us what the object of the introduction of this proviso was, namely, to preserve for the clergy an advantage they were supposed to have gained by the decision in *Joddrell's Case* (3)—a matter wholly irrelevant to the present discussion: see 2nd edition of Ryde on Rating, pp. 428, 429.

The difficulty, however of judicial interpretation remains the same. This proviso appears to me—I speak with the same embarrassment that Lord Denman experienced—to have been intended to apply only where there is a question of the comparison of the relative liabilities of different kinds of hereditaments, such as existed in *Joddrell's Case* (3), and not to have been intended to apply to a discussion in regard to the valuation of a single heredi-

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tament by itself with which the body or enacting part of the section is conversant. But if this was the intention of the Legislature, it is, nevertheless, very difficult to see that it in any way qualifies or affects the body or enacting part of the section. It leaves principles and relative liabilities as they are, and I can see nothing in the history of those principles or relative liabilities to prevent a publichouse being regarded as a single *totum* equipped with a license. In my opinion this proviso has no application at all to the question before us, and seems never to have been referred to in any kindred case—at least in any of the cases cited at the Bar. It was not once mentioned in *Cartwright's Case* (1), either in the Court of Appeal or House of Lords.

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"according to which the value of the occupation of the hypothetical tenant contemplated by the Parochial Assessments Act is to be estimated is, to assume the continuance of those circumstances which constitute the value to the existing occupier, unless it be made to appear those circumstances are about to undergo a change." Surely one of those circumstances is the existence of the license.

The solution of the question before us appears to me mainly to depend upon the question as to whether the license may be considered as attached to the house, whether the house is a house with a license attached to it, or a house without one. The House of Lords in *Cartwright's Case* (1) plainly considered the license as attached to the building or house. Lord Brampton expressly dealt with the case as a house with a license, and the allegation that it was to be regarded as a merely personal privilege, independent of the house, was rejected by the arbitrator, whose judgment was affirmed by both the Court of Appeal and House of Lords. There is no doubt that the license is not, so to speak, a mere personal license, available by the person to whom it is granted anywhere and everywhere. It is a privilege confined to a particular house, the rightful possession of which carries with it to the assignee a right to the transfer of the license, subject to statutory conditions. See the third proposition in *Brennan's Case* (2), adopted both by the Lord Chancellor and Lord Justice FitzGibbon in *Montague's Case* (3). These cases, amongst others, are referred to in the short and clear, and, in my opinion, correct judgment of the Recorder of Belfast, reported in the 38th volume of the Irish Law Times, p. 149.

Here I may refer to *The Banbridge Case* (4), which was pressed on our consideration. That was a case of *detached* machinery, and not a case of an *attached* license. It was a case of a mill and machinery, two distinct matters, each the subject-matter of property which an Act of Parliament required should be treated distinctively, and not one *totum* equipped with a license, such as the publichouse here was. Here we have one *totum*, call it hereditament or building, equipped with a license, the occupation of which had an added

(1) [1900] A. C. 150.
(2) 21 L. R. Ir. 353.
(3) 29 L. R. Ir. 429.
(4) 4 Ir. C. L. R. 394.

value by reason of its equipment. It is true that Chief Justice Lefroy, in giving judgment, said that English cases were not applicable in Ireland. The case, however, was decided on another ground; and Chief Justice Lefroy's expression of opinion was definitively dissented from by Crampton, J., and by Moore, J., as far as he considered it; and the passing of the Act upon which the case was decided would tend to show Lefroy, C.J., was wrong.

But to return to the test adopted by both the Court of Appeal in England and the House of Lords, I think to contend that the existence of such a license would not affect the mind of an intending tenant in considering the rent he would give for the premises, is really nothing more or less than to make a statement equally opposed to common experience and to common sense. Lord Halsbury's words in *Cartwright's Case* (1), in the Court of Appeal, should never be lost sight of. He said—I refer to his words again—"The problem is to ascertain according to the statute what a tenant from year to year might reasonably be expected to give as rent." In the solution of that problem it appeared to him that all that could affect the mind of the intending tenant ought to be considered. The same problem is presented in the Irish statute in practically identical language. I have said "practically identical language" because in both statutes the problem as to rateable value is practically the same. It has been said that "rates," and "taxes," and "repairs," point rather to a mere house or building than to a publichouse. These words are in the English statute as well as in the Irish statute. Their presence in the former did not affect the decision in *Cartwright's Case* (1), and I confess I do not see why "rates," "taxes," and "repairs," are less consistent with the idea of a publichouse than with that of any other house.

A point occurred to me which was not referred to at any length at the Bar. It was, I believe, glanced at by Mr. Clancy, and as this case, having regard to its very great importance and to the difference of opinion in this Court, is certain to be brought to the Court of Appeal, I think it well to state what

(1) [1900] A. C. 150

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it was, that it may be fully considered there. The publicans will have the benefit of it, if the Court of Appeal think there is any substance in it. The point then was this, that if in the valuation of a publichouse for poor rate purposes regard was had to the license attached to the house, there might be, so to speak, a double assessment in respect of the license, that is to say, if under the Act of 1825, license duty was charged on the house as a licensed house by the excise, and if for poor law purposes the house as a licensed house was again valued as such, the same premises might be considered to pay twice over. It occurred to me that this might be held to be a good objection to assigning any added value to the house by reason of its being a licensed house. However, on consideration, I do not think this would be a good objection. First, because it would equally apply in England and no weight was attached to it there; indeed the point does not appear to have been taken in England, no doubt because it was considered unsubstantial. Secondly, because excise duty is one thing, poor-rate another. Thirdly, the valuation, annual value, under the English Act of 1836, and under the Irish Act of 1852, is what a sensible yearly tenant would give as rent for the publichouse. The rent he would give would be calculated with regard to what (amongst other things) it would cost to keep up the license. The cost of the license would be one of the "other expenses" referred to in the 11th section. If there was no license duty, the tenant would pay so much more rent. If there was a license duty, he would pay so much less rent. The valuation would therefore be on the basis that having to pay the duty he would give so much less rent. He, therefore, would not pay twice over. The net rent representing the valuation would be the gross rent, less repairs, license duty, &c., necessary to maintain the premises in their existing state to command the rent. For these reasons (1, 2, and 3), I do not think there is any substance in the objection that occurred to me, but if there is, the appellants will have the benefit of it in the Court of Appeal.

The question as to whether the license attached to the house is to be regarded, is not to be confounded with the questions referring to good-will. Good-will may sometimes, according to the defini-

tion given of it, be regarded, but it can not be regarded as attached to the house in the same way as a license is. The arbitrator in *Cartwright's Case* (1) discriminated between license and good-will (see paragraphs 7, 8, & 9, pp. 688 and 689 of the report). This matter of good-will is very well discussed in Mr. Ryde's book on pages 467 to 470 of the second edition. I think he accurately sums up the result at p. 469, where he says:—"The result appears to be that the rating authority in the first instance, and (on appeal) the Sessions, must determine as a fact whether the 'good-will' of each publichouse dealt with is wholly or in part *attached* to the premises or not; and if they find that it is, it appears to follow as a matter of law that the value of the 'good-will,' so far as it is *attached to the premises*, must be regarded as part of the value of the premises, and must be taken into account in estimating the rateable value, just as much as the existence of the license." It will be perceived that in this passage the writer deals with good-will as something different from the license, and deals with the license, the matter before us, on the basis that there was no question as to the propriety of taking it into consideration. This appears to me to be right—the fact is that in England the hereditament and license attached are regarded as a single entity made up of house and license. The house, so to speak, was clothed with a license, and it is valued accordingly in England, such as it is, a publichouse, and not, such as it is not, a mere, bare, unlicensed brick-and-mortar building. I think the same rule should obtain in Ireland. It is said, however, that the construction which has been applied in this country to the Irish statute has met with Legislative recognition and sanction. The 7th sub-section of section 43 of the Inland Revenue Act of 1889, 43 & 44 Vict. c. 20, is referred to. It is argued that this section proceeds upon the basis of a recognition of the actual practice under the Irish Valuation Act, and that in fact it amounts to a declaration that that practice is right. I cannot adopt this argument. I entirely agree with what my brother Gibson said in reference to this; it is not necessary to repeat it. I suggested during the argument that the words "shall not exceed the amount of the value assigned

(1) [1900] A. C. 150.

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thereto" do not point to an actual figure ascertained by a then existing practice, but are to be read as if the words were "shall not exceed the amount of the value properly assigned thereto in the valuation for the time being in force under 15 & 16 Vict. c. 63." It was not denied that if this be so, and I think it is so, the section threw no light on the construction of the Irish Valuation Act.

In relation to the question I am now discussing, one more topic remains. It is said that the 15 & 16 Vict. c. 63 (the Irish Valuation Act), must be construed in the light of the practice which has existed for now over fifty years. The doctrine of *contemporanea expositio* is appealed to. This doctrine, if not altogether relegated to the limbo of things discredited, has been rudely shaken. The Lord Chief Baron, in the case of *The Queen* v. *Inspector of Fisheries* (1), treats this doctrine of *contemporanea expositio* as practically at an end. Speaking of the practice which obtained under a certain decision of the Queen's Bench, he is reported to have said, at p. 69 of the report:—"Upon this question the decision of the Queen's Bench in *Moore-Smyth* v. *The Duke of Devonshire* (2) has been relied upon by the appellant—a decision pronounced nearly a quarter of a century since, and uniformly acted upon since that time. I fully recognize the inconvenience of declining at such an interval of time to follow the considered, though not the unanimous, decision of that high tribunal; but were it necessary to do so, the decision of the House of Lords in '*The Sara*' (3) leaves us no alternative." In the case of "*The Sara*" (3), to the judgment in which the Lord Chief Baron referred, Lord Macnaghten is reported to have said:—"I am sensible of the inconvenience of disturbing a course of practice which has continued unchallenged for such a length of time, and which has been sanctioned by such high authority. But if it is really founded upon an erroneous construction of an Act of Parliament, there is no principle which precludes your Lordships from correcting the error. To hold that the matter is not open to review would be to give the effect of legislation to a decision contrary to the intention of the Legislature, merely because it has happened, for some reason or other, to remain unchallenged for a certain length of time."

(1) [1896] 2 I. R. 40. (2) Fishery Cases, June 17, 1871. (3) 14 A. C. 209.

And with reference to the same doctrine the Court of Appeal in *The Ballycastle Case* (1), notwithstanding the long practice which was admitted in that case to have existed, gave effect to their own opinion as to the true construction of the statute before them. Lord Justice Holmes is reported to have said (p. 296) :—"I desire to add a few words on a topic with which we were much pressed during the argument. It was said that the Local Government Board has always acted on the assumption that it had jurisdiction under the Act of 1878 to determine that the whole district or any part thereof was the area of charge, and that a contrary decision would lead to great confusion. This is a strong reason for the exercise on our part of caution ; but if we form, however reluctantly, the opinion that the Board has misconceived its powers, we are obliged to say, notwithstanding the chaos which Mr. Chambers has threatened, *fiat justitia*." I might refer to many other cases on this point, such as *In re M'Naul's Estate* (2) and *In re Doherty's Presentment* (3).

The rules made by Sir Richard Griffith were merely of an advisory character, and though they received the sanction of the Viceroy for the time being, we cannot allow what we believe to be an erroneous practice in any way to control or modify our clear opinion as to the true construction of the statute. It is to be remembered when the doctrine of *contemporanea expositio* is resorted to, that not a single judgment of a court of law or judicial opinion has been referred to affirming the validity of the practice now under review. This case is wholly different from such cases as *In re Kane* (4) in the Court of Appeal, and the case in this Court of *The Queen* v. *The Justices of Cavan* (5), where the judgment in *Clitheroe's Case* (6) was sought to be reviewed. It would indeed be a very glaring anomaly to give any effect whatever to a practice, however long, which would be inconsistent with the decision in *Cartwright's Case* (7) in the House of Lords, which decision, in my opinion, rules the controversy before us. That case really proceeded on the basis, as a matter beyond controversy, that

(1) [1904] 2 I. R. 270.
(2) [1902] 1 I. R. 114.
(3) [1895] 2 I. R. 158, 493.
(4) [1901] 1 I. R. 520.
(5) 30 L. R. Ir. 137.
(6) I. R. 11 C. L. 412.
(7) [1900] A. C. 150.

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regard should be had to the license. I am, then, very clearly of opinion that in ascertaining the value of a publichouse, under the Irish Valuation Act, regard must be had to the license attached to it.

One other question remains for decision. It is argued that the persons appointed as valuators in the present case were not such as should be appointed under the Act of Parliament, because, though they took no part in the original valuation of the public-house in question, they did value in the general re-valuation which took place in some other premises in the city of Belfast. I do not think this objection is now open to the appellant; he took his chance with the valuators that were appointed, and cannot now challenge their competency. However, independently of this, I think there is no substance in the objection. The solution of the question depends upon the true construction of the 20th section of the Valuation Act. It provides that on the receipt of a notice of appeal from a person appealing against the valuation which has been had, the Commissioner of Valuation shall inquire into the subject-matter thereof, and, if necessary, direct a valuator or surveyor, as the case may require, who shall not have been previously employed in making the original valuation contained in the lists, to view such hereditament or tenement, and investigate the complaint stated in such notice. The question turns upon the words *original valuation*. Do these words mean any part of the subject-matter of the general re-valuation which has taken place, or are they confined to the valuation that has been previously had of the house under discussion. We are all of opinion that they are confined to the latter, that is to say, to the valuation that has taken place *quoad* the house the valuation of which is the subject-matter of appeal. The words "original valuation" seem to be clearly confined to the one that has taken place in reference to the particular tenement or hereditament with regard to the valuation of which the controversy arose. This is what the aggrieved person served notice with reference to under the 19th section, and which, as the original valuation, became the subject-matter of review under the 20th section. We all, including my brother Madden, concur in thinking that the decision of the Recorder of Belfast was correct in reference to this question. My brother Gibson and I

concur in the opinion that in the valuation of a publichouse, regard should be had to the license. On both questions before the Recorder of Belfast, his decision was, in my judgment, correct.

J. G. T.

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Armstrong appealed to the Court of Appeal (Lord Ashbourne, C., Fitz Gibbon, Walker, and Holmes, L.JJ.).

Matheson, K.C., Henry, K.C., and *Clancy*, for the appellant.

Fitz Gerald, K.C., and *R. C. K. Wilson*, for the Commissioner of Valuation.

The arguments were the same as in the Court below.

Cur. adv. vult.

Feb. 28.

LORD ASHBOURNE, C. :—

This is an appeal from the King's Bench Division, and involves the decision of very important questions on the law of valuation in Ireland.

The Lord Lieutenant having, pursuant to section 34 of the Valuation (Ireland) Act, 1852, directed a re-valuation of the city of Belfast, the Commissioner of Valuation valued the appellant's premises at the annual sum of £185.

Prior to the re-valuation the appellant was occupier of the licensed house and premises situate at 159 and 161, Shankill-road, in the city of Belfast. The said premises were then valued at the annual sum of £115, which sum did not include anything on foot of the value of the license. The above-mentioned sum of £185 included a sum on foot of the estimated increased letting value of the premises attributable to the license. On appeal to the Commissioner, he reduced the sum of £185 to the annual sum of £170.

The appellant further appealed against the said valuation of £170 to the General or Quarter Sessions of the Peace for the city of Belfast, pursuant to section 22 of the said Act, on the ground that the said valuation was *ultra vires* and excessive, and was not

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in conformity with the valuations of the surrounding property, and was not in accordance with the provisions of the Act in that case made and provided.

The learned Recorder of Belfast, after full argument, confirmed the valuation on the ground that it was made in conformity with the provisions of 15 & 16 Vict. c. 63; but on the request of the appellant, he stated a case for the opinion of the Superior Court.

When the case came before the King's Bench Division, the Lord Chief Justice and Mr. Justice Gibson affirmed the judgment of the Recorder of Belfast—Mr. Justice Madden dissenting—and from that order this appeal has been taken.

The question to be decided is of much legal and financial importance—Are licensed publichouses to be valued with regard to, or without regard to, their licenses? In England, they are valued with regard to their licenses, while in Ireland they have heretofore been valued without such regard. The question in the case, therefore, comes to this—Is there any substantial difference in the Irish valuation code which would give any legal justification for the valuation of Irish publichouses being made without regard to their licenses? What is the clear and settled state of the law in England? I do not deem it necessary to discuss the earlier statutes; but it is essential to note with precision the Parochial Assessments Acts of 1836. Section 1 enacts that, "No rate for the relief of the poor in England and Wales shall be allowed by any Justices, or be of any force, which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto—that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rentcharge, if any, and deducting therefrom the probable average cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent."

It cannot be too strongly borne in mind that this case comes before us solely as a valuation appeal, and that it is only an incident in that appeal that its subject-matter is a licensed publichouse. It is, however, fortunate that we have before us an authoritative decision on the application of the English section I have

read to a licensed publichouse in England. *Cartwright's Case* (1), so often referred to in the judgments of the King's Bench Division and in the arguments before us, leaves no possibility of doubt or question that in England, in the case of a licensed publichouse, the license had to be considered, and that it increased the value of the hereditament. Lord Halsbury, L.C., in giving judgment in the Court of Appeal, said: "I am of opinion that this appeal must be dismissed. The problem is to ascertain, according to the statute, what a tenant from year to year might reasonably be expected to give as rent. For the solution of that problem it appears to me that, apart from the decisions, all that could reasonably affect the mind of the intending tenant ought to be considered." Lord Macnaghten, in the House of Lords in the same case, gave his opinion with equal clearness: "It appears to me that the volume of business done in a publichouse, as apparent to the man in the street, if I may use such an expression, is the very first thing that a tenant proposing to make an offer for such a house would take into consideration."

The Mersey Docks Case (2) is important as showing that the principles laid down in *Cartwright's Case* (1) were not at all peculiar to licensed publichouses, but were applicable wherever a hypothetical rent, payable by a hypothetical tenant, had to be ascertained.

The law in England being thus absolutely clear, what is the law applicable to Ireland? The Irish Valuation Act, 15 & 16 Vict. c. 63, s. 11, enacts that, "In regard to houses and buildings," the re-valuation is to be "made upon an estimate of the net annual value thereof—that is to say, the rent for which one year with another the same might in its actual state be reasonably expected to let from year to year, the probable average annual value of repairs, insurance, and other expenses, if any, necessary to maintain the hereditament in its actual state, and all rates, taxes, and public charges, if any (except tithe rentcharge), being paid by the tenant."

The hereditaments which were to be deemed rateable for the purposes of the Act included lands, buildings, opened mines,

(1) [1899] 1 Q. B. 667; [1900] A. C. 150. (2) [1901] A. C. 175.

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profits *à prendre*, rights of fishery, canals, railways, easements, and tolls."

It is manifest that the very closest similarity exists between the English and the Irish sections, and that it is vital to the appellant's case to show that, notwithstanding this apparent similarity, there are really some substantial distinctions which would justify a different practice in each country. There is no doubt that there has up to this been a different practice in Ireland to that prevailing in England, although not one affirmed or supported by the decision of any reported case. The case of *M'Master* v. *The Banbridge Union* (1), decided in 1855, cannot certainly be relied on for the purpose, notwithstanding the dissenting judgment of Chief Justice Lefroy. *The Clonbrock Case* (2) applied to collieries the principle of valuation adopted in England, notwithstanding that our Irish Act laid down expressly no such principle —thus showing that the Judges considered that there was a substantial identity in principle in the laws of the two countries.

But the appellant nevertheless seeks to make out that there are reasons why the Irish Act should not be interpreted in the same way as the English Act. Mr. Justice Madden, in his dissenting judgment, admitted that no reliance could be placed upon the suggestion of *contemporanea expositio*, and he placed no weight upon the alleged recognition of the Irish practice in the Inland Revenue Act of 1880 (43 & 44 Vict. c. 20, s. 43), which was passed for excise purposes. I put aside also the instructions to valuers issued under the Act of 1853 by Sir Richard Griffith. They were merely of an advisory character, and cannot control or regulate the legal interpretation of the statute. I am unable to attach any weight to the circumstance that the proviso in sect. 1 of the Act of 1826 is not to be found in the Irish Act. It is rather obscure and not very easy to follow with precision, but it is alleged that it was intended to carry on the old atmosphere and to influence the construction of the statute. But all the authorities proceed on the legal construction of the actual words of the section, and I am unable to find that reliance has ever been placed upon the proviso to assist in the ascertainment of the rent of the

(1) 4 Ir. C. L. R. 394. (2) [1896] 2 I. R. 560.

hypothetical tenant. Weight has also been placed upon the fact that the Valuation Act, 1852, requires houses and buildings to be valued "in their actual state"; and that as this phrase is not found in the English Act, the Legislature contemplated a different interpretation. The words are to be found in the Irish Poor Law Act, and express the familiar principle of rating law that the rate should be placed upon the actual state of the hereditament. They merely state settled law, and if they were omitted the result would probably be the same. I am entirely unable to give any assent to the appellant's argument that "actual state" refers only to the structural condition of the premises. Its "actual state" involves the consideration of its situation, its character, its capacity for earning, all that would affect the rent that would be paid by a hypothetical tenant. Is it not obvious that if a licensed publichouse is considered entirely apart from its having a license it is not valued in its "actual state," and that an element, probably the most persuasive in the mind of the hypothetical tenant, is omitted?

In my opinion the English and the Irish valuation codes are substantially identical. The construction of the English Act is clear and established by decisions of the highest authority; and I see nothing to give any legal justification for different decisions in Ireland.

On the minor point, as to the alleged disqualification of the valuators, I concur in the unanimous opinion of all the Judges of the King's Bench Division.

In my opinion, for the reasons I have given, the order of the King's Bench Division was right, and the appeal should be dismissed with costs.

FITZ GIBBON, L.J.:—

I concur. I am unable to find any material difference between the English and the Irish statutes regulating the valuation of tenements in general, or of licensed premises in particular. I therefore feel myself bound by the English authorities to hold that this appeal cannot be allowed.

On principle, I am of opinion that the use for which a tenement is suitable, and the effect of its suitability in making its occupation profitable, and in creating a special demand by potential tenants

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for its occupation, cannot be excluded from consideration in assessing its value.

Furthermore, I cannot understand how the value of any tenement, or of any other property, can be ascertained without considering the uses to which it may be put, and the pecuniary profit obtainable from its possession; and also the number and the means of the persons who, as potential tenants or purchasers, would be likely to become competitors for its acquisition for purposes of profit or enjoyment.

These elements must, in my opinion, affect value, notwithstanding that the measure of their effect is not to be gauged by accounts of trade profits, nor, in the case of licensed premises, by any attempt to treat the premises and the license as separate subjects of valuation.

WALKER, L.J.:—

I should have been almost prepared to state my simple concurrence in the result arrived at by the majority of the Judges in the King's Bench Division and the reasons they have given for their conclusion, were it not that I wish emphatically to disclaim the notion that our decision has any special application to the case of publichouses. The case has been almost argued as if it would affect them only, or as if the construction of the statute which we have to interpret found its subject only in the case of a licensed publichouse. That is an entire mistake, apparent, of course, to every legal mind; and if authority were wanting to illustrate that, it is found in the decision of the House of Lords in *The Mersey Docks Case* (1), where the subject of valuation was buildings on the Mersey used for the reception and slaughter of cattle and sheep brought from abroad, and for the cooling and preservation of the carcases. Our decision applies to all houses and buildings for which the hypothetical rent payable by the hypothetical tenant has to be estimated.

In my opinion our decision would be the same if we had no English decision on analogous legislation to guide us. I would indeed arrive at the same conclusion if we had only the Act of 1852 to construe.

(1) [1901] A. C. 175.

Take the case of the first subject mentioned in it—land. In that case the net annual value is to be estimated by supposing it in the hands of a tenant, and then estimating its yield as tillage-land or grazing-land according to the supplied scale of prices. The hereditaments in the 12th section, of which I may only mention railways, tramways, and tolls, are obviously valued by their product; but then, as regards houses and buildings, I cannot conceive any legislation plainer than the test supplied at foot of the 11th section "upon an estimate of the net annual value thereof, that is, to say, the rent for which one year with another the same might in its actual state be reasonably expected to let from year to year, the probable average annual cost of repairs, insurance, and other expenses, if any, necessary to maintain the hereditament in its actual state, and all rates, taxes, and public charges, if any (except tithe rentcharge), being paid by the tenant."

It is conceded that, for the purpose of estimating hypothetical rent, something beyond the mere bricks and mortar must be taken into account—for instance, the situation; but it is contended that the capacity for earning power and the use for which it is intended and fitted in order to earn rent cannot be considered.

I can only say, with Lord Macnaghten, in *Cartwright's Case* (1), in construing a section practically identical, "It is a question of common sense and not a question of law. It is a question of common sense in the application of the plain language of the Act of Parliament," and, as Lord Morris says, in the same case it would be to be "precluded as a matter of law from entering upon the very question which, as I have said, in my opinion, is almost the first question that the hypothetical tenant would put."

It may be that the existence of a license, in respect of the house to be valued as a rent-earning subject, appeals to one's common sense more strongly than many others; but by no means all others. Instances may be easily multiplied to show this. Several of them are mentioned by Gibson, J.; and the case of the slaughter house, which has in fact occurred, is an obvious illustration. To say that you are taxing a good-will, in the sense of taxing profits, when you have regard to the existence of

(1) [1900] A. C. 150.

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the license, assumes that you should not regard it in applying the 11th section of the Valuation Act; and we are, therefore, remitted to the true construction of the Act.

But then, how can we escape from applying the decisions in the House of Lords? These are not rested on the old law which ceased to be applicable when the Act of 1840 was passed, nor can they be explained by the suggestion that there was some innate idea of taxing profits, which, as was said, lingered in the mind of Judges notwithstanding that the Act of 1840 had removed its foundation, because the decisions are expressly founded on the interpretation of a statute which cannot be distinguished from our Valuation Act. I have placed the two side by side, and can see no difference.

I am glad, however, to be able to rest my view also on the interpretation of our Valuation Act as a self-contained code.

With regard to the argument founded upon the Revenue Act of 1880, I think the Attorney-General gave the true explanation of it; but in no view can I regard it as a legislative declaration that the valuation should be upon the house, minus the value of it by taking into account the license. The words, "not exceeding," used are sufficient to show that.

The minor point as to disqualification of the valuators is open to two answers—(1) I think the disqualification only applies if they had previously valued the particular tenement which is the subject of controversy; and (2) I do not think the point goes to jurisdiction to entertain the appeal which we have to hear and dispose of. On this point there was no difference of opinion in the King's Bench Division.

HOLMES, L.J.:—

The order appealed from was made on the hearing of a case stated by the Recorder of Belfast for the decision of the King's Bench Division, pursuant to the statute 23 & 24 Vict. c. 4, sect. 10.

The lists prepared in carrying out a general revision of the valuation of rateable property in the city of Belfast, set forth the sum of £185 as the annual value of a house, in which a licensed publican named Armstrong carries on his business. This gentleman, feeling aggrieved thereby, served the notice

prescribed by sect. 19 of the Valuation Act of 1852, whereupon the respondent, pursuant to sect. 30, directed two valuers to view Mr. Armstrong's premises and to investigate his complaint, with the result that the annual valuation was reduced to £170. The publican, still dissatisfied, appealed to the next General or Quarter Sessions of the Peace. Two objections were taken to the amended valuation on the hearing of this appeal. First, it was contended that the valuation of £170 was arrived at without jurisdiction, inasmuch as the two valuers who had been directed to investigate the complaint, although not previously employed in connexion with the valuation of Mr. Armstrong's premises, have been engaged in the re-valuation of other houses in Belfast, and were, therefore, disqualified by the terms of the 20th section. The object of the provision in question was to authorise the Commissioner of Valuation, if he so desired, to have the assistance of an independent adviser, and I am disposed to think that its language points to the employment of a valuer or surveyor who had not been employed theretofore in making any of the valuations contained in the lists. But it is an enabling, not a disabling, provision. The Commissioner might have enquired into the complaint in some other way. He might have asked the original valuer to look into the matter again; he might have visited the premises himself; he might have sent down any of his official staff; and if he had employed an independent adviser, he might have declined to act on his report. The responsibility of dealing with the complaint rested with him; and the valuation altered or amended by him was binding and conclusive, unless successfully appealed from. Therefore, I am of opinion that the Recorder was right in proceeding to hear the evidence, and to decide whether the amended valuation ought to be upheld or varied. The second matter discussed relates to the principle of valuation applicable to a publichouse. The Recorder found the annual value of the premises to be £115, if they were not licensed; but valuing them with the license attached, he confirmed the valuation appealed from. The two methods are fundamentally different; and the Divisional Court was asked in the case stated to decide which of them is in accordance with law.

The question is of great general importance, and was considered

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with the care and completeness which its gravity deserves. Concurring as I do in the conclusion arrived at by the Lord Chief Justice and Mr. Justice Gibson, I am relieved by their learned and exhaustive analysis of the statutes and authorities from stating my views at any length. The appeal was opened on the basis that the law in England is in accordance with the decision of the Recorder. It has been settled by case after case in every English Court, including the House of Lords, that a publichouse must be valued as a house in which the business of a publican is legally carried on under the protection of a license. Counsel for the appellant, admitting this fully and without reservation, have directed their efforts towards showing that the statutes relating to the valuation of rateable property in Ireland differ from those in force in England, and that according to their true construction a publichouse ought to be valued as a building, irrespective of the nature of the business carried on therein. Almost the only English Act to which it is necessary to refer is 6 & 7 Wm. 4, c. 96, passed to regulate parochial assessments. Section 1, after reciting that it is desirable to establish one uniform mode of rating for the relief of the poor throughout England and Wales, enacts that from and after a specified date no rate for the relief of the poor shall be of any force which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year free of all usual tenants' rates and tithe commutation rentcharge, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses necessary to maintain them in a state to command such rent.

There follows a proviso, to which it is needless to refer, inasmuch as I have heard no intelligible explanation of it, and it is at least certain that it does not qualify the previous provision when applied to estimating the net annual value of a building. Before the passing of this Act parochial assessments for the relief of the poor were governed by the Act 43 Eliz. c. 2, the language of which was so vague that no rule could be deduced from it. Judge-made law, however, had gradually laid down the principle that in the case of hereditaments the occupiers were rated on an

estimate of the rent which an hypothetical tenant would give on the assumption that he was to pay for repairs and maintenance. In addition to this assessment inhabitants of a parish were liable to be rated in respect of visible property which was not real estate, such, for example, as stock-in-trade. The Act of 1836 dealt only with the former, leaving the latter untouched; and declared the law regulating the parochial assessment of all hereditaments in accordance with the principle gathered from judicial decision.

Whatever difficulty there may be in applying the rent-test to certain classes of hereditaments, there is none in the case of buildings. They are let every day; and the chief consideration operating on the mind of a would-be tenant is their suitability for the purpose for which they are to be used. If a man of means and position is looking for a residence in a city, he will be prepared to give a much higher rent for a house in an aristocratic quarter than for one equally convenient in a bourgeois neighbourhood. If a man requires premises in which to carry on a trade or other commercial enterprise, he will naturally select, if he can get them, buildings in which a similar business has been already successfully carried on. He will incur less expenditure in fitting them for his purpose; and will hope for a continuance of their past prosperity.

There is not, as far as I am aware, anything exceptional in the mode of valuing publichouses in England for the purposes of rating. They are in the same position as premises used for any other business, the rent of which must depend largely upon the nature and extent of the business carried on therein. It is impossible to eliminate this consideration in applying either the rent-test or any other rational standard of value. Let me take, as an example, a building constructed to be used as an hotel. An intending tenant is satisfied with all its internal arrangements, but he finds that it is a long way from a railway station and in a part of the country to which visitors rarely come. This will naturally affect his estimate of the rent he can afford to pay. If, on the other hand, he finds that train accommodation is good, and that tourists abound, but that the licensing authority has refused a spirit license for the house, he will be influenced by

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this in making his proposal. No reason can be given for taking into account the first-mentioned circumstance in valuing the premises and for disregarding the second.

I might discuss more fully the grounds of the English decisions, but I have already exceeded the limits within which I had intended to confine my observations. It is enough for me to know, that it has been held by an authority by which this and all other Courts in the Kingdom are bound, that under the statutes in force in England applicable to the valuation of rateable hereditaments, the true principle is that acted on by the Recorder. I proceed, therefore, to compare the Irish legislation with the English. We have in this country no statute corresponding to 43 Eliz. c. 2. Our Poor Law Code is to be found in 1 & 2 Vict. c. 56, the 63rd section of which enumerates the hereditaments that are rateable thereunder, amongst which are included buildings. Section 64 enacts that "every rate shall be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which one year with another the same might, in their actual state, be reasonably expected to let from year to year, the probable annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain the hereditaments in their actual state, and all rates, taxes, and public charges, if any, except tithes, being paid by the tenant." If this section is compared with section 1 of the Act regulating parochial assessments in England, passed in the previous year, it is clear that the one is taken from the other, and that the same principle is adopted in both. The introduction into the Irish section of the words "in their actual state," and "one year with another," is merely an expression of what is implied in the English; and the only difference consists in excluding in Ireland tithes from the public charges which the tenant is assumed to pay. It seems to me to be impossible to distinguish between the modes of estimating the net annual value of business premises prescribed by the two sections. The only ground of distinction suggested in the argument is that inasmuch as, in England, personal property was liable to be rated under the statute of Elizabeth, the valuation on which the rate is founded includes not only the value of the building, but of the profits of the business carried on therein, while personal property not being

rateable in Ireland, the valuation ought to be confined to the physical edifice.

This view was taken by Lefroy, C. J., in *M'Master* v. *The Banbridge Union* (1); but it was dissented from by the other members of the Court—Crampton, J., and Moore, J.—who held that there was no substantial difference between the English and Irish Poor Law Acts, in so far as they related to valuation. In this they were clearly right, as whatever doubts might have existed before the passing of 3 & 4 Vict. c. 89, they were removed by that statute, which put an end to rating, based on ability, derived from the profits of stock-in-trade, or any other property. The valuation section which I have quoted from the Irish Poor Law Act was repealed by 15 & 16 Vict. c. 63, which is the foundation of the valuation of rateable property now in force in Ireland. It provides different modes of valuation for different kinds of hereditaments; but in regard to houses and buildings, it repeats, almost word for word, the 64th section of 1 & 2 Vict. c. 56, which I have shown is practically identical with section 1 of the Act of 1836, on which the English authorities have been decided.

I have already pointed out that the rent-test was peculiarly appropriate to houses and buildings; and I have no doubt that this was the reason for its being retained for them when alterations were made in the mode of valuing other hereditaments. There has been no change in this respect in the law of either country since; and even if I doubted the soundness of the principles laid down in the English authorities, I should be bound to act on them.

The argument on behalf of the appellant, founded on the Inland Revenue Act, 1880, section 43, sub-section 7, has been so fully and clearly examined by Mr. Justice Gibson, that beyond saying that I concur in his reasoning and conclusion, I do not propose to discuss it.

In conclusion, I wish to repeat that the result of our judgment is not to lay down a rule for the valuation of publichouses different from the rule applicable to other business premises. The fact that the publican requires an excise license to carry on his trade, is

(1) 4 Ir. C. L. R. 394.

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an element to be taken into account on arriving at the hypothetical rent; and to exclude it, would be to put his premises into an exceptional position. The chance of the license being lost is only one of those uncertainties to which the value of property of every kind is subject, and for which special provision by means of annual revision is made in our valuation code.

Solicitor for Armstrong: *John M'Cormick.*

Solicitors for the Commissioner of Valuation: *Wheeler & M'Cutcheon.*

G. Y. D.

K. B. Div. 1905. Jan. 12, 24.

THE KING (AT THE PROSECUTION OF JAMES M'GRATH) *v.* THE COUNTY COURT JUDGE AND CHAIRMAN OF QUARTER SESSIONS AND OTHER JUSTICES OF THE COUNTY OF CLARE (1).

Justices—Jurisdiction—Complaint—Conviction—Assault—24 & 25 Vict. c. 100, s. 40—Single offence, with matter of aggravation—Reversal at Quarter Sessions upon the erroneous ground that the order was bad on its face— Certiorari—*Mandamus.*

Justices at Petty Sessions made an order in the following form:—"Upon the hearing of a complaint that, &c., the defendant did unlawfully assault the complainant, by striking him on the face with a stone and cutting him, an order was made on, &c., against Cornelius Collins, farmer's son, to the following effect, viz.—Convicted; fined 21*s.*, with 20*s.* costs, and in default of payment forthwith to be imprisoned in Limerick Prison for one calendar month, with hard labour, unless said sums be sooner paid." On appeal by Collins to Quarter Sessions, that Court reversed the Petty Sessions order, on the ground that the conviction was bad on its face, for not stating the offence for which the accused was convicted:—

Held, that the complaint, being for a single offence, which the Justices at Petty Sessions had jurisdiction to entertain, viz. an assault under 24 & 25 Vict. c. 100, s. 40, coupled (by describing how the assault was committed) with matter of aggravation, the conviction was good on its face, and the Court of Quarter Sessions were wrong in reversing it upon the preliminary point, without deciding the case upon the merits, and that therefore a *certiorari*

(1) Before PALLES, C.B., and JOHNSON and GIBSON, JJ.

should be awarded to quash the order made at Quarter Sessions, and, on its return, a mandamus to the Chairman and Justices, to proceed to hear and determine the appeal.

MOTION to make absolute a conditional order of *certiorari* to bring up and quash an order of the Chairman of Quarter Sessions and Justices of the county of Clare, made at Kilrush Quarter Sessions on the 13th October, 1904.

James M'Grath, of Decomade, in the county Clare, farmer, caused a summons under the Petty Sessions (Ireland) Act, 1851, to be issued at his suit against Cornelius Collins, of the same place, farmer's son, charging him with having, on the 24th June, 1904, unlawfully assaulted and beaten him by striking him on the face with a stone and cutting him. Cornelius Collins appeared before the Justices at Kildysart Petty Sessions on the 11th July, 1904, in obedience to the summons and, after hearing the evidence, the Justices made an order which was certified as follows:—"Upon the hearing of a complaint that, on the 24th June, 1904, at Decomade, in the county of Clare, the defendant did unlawfully assault the complainant by striking him on the face with a stone and cutting him, an order was made on the 11th day of July, 1904, by Justices present against Cornelius Collins, farmer's son, to the following effect, viz.—convicted and fined 20*s.*, increased to 21*s.* on the application of defendant's solicitor, with 20*s.* costs, and, in default of payment, forthwith to be imprisoned in Limerick Prison for one calendar month, with hard labour, unless said sums be sooner paid." Cornelius Collins having appealed, the case came before the Chairman and Justices at Quarter Sessions on the 13th October, 1904, when the Chairman reversed the order of the Justices on the ground that the conviction was "bad on its face, for not stating the offence for which accused was convicted." James M'Grath, on application to the Court on the 22nd November, 1904, obtained a conditional order directing a writ of *certiorari* to issue to the Chairman and Justices at Quarter Sessions to quash their adjudication on appeal, on the grounds that it was made without, and in excess of, jurisdiction, and that it was bad upon the face of it, inasmuch as such Chairman and Justices held that the conviction was a conviction made in respect of alternative charges, whereas, in fact, it was not so. No cause was shown, and,

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upon the case coming before the Court on the 21st December, 1904, on an application by the prosecutor to make absolute the conditional order, the case was allowed to stand over until the 12th January, 1905, in order that the conditional order, and the notice of motion to make same absolute, should be served upon the Chief Crown Solicitor, and upon the defendant in the Court below.

Charles F. Doyle, for the prosecutor :—

The jurisdiction of the Justices at Quarter Sessions is only to hear and determine on the merits, making such amendments as may be necessary and legitimate : they have no jurisdiction to erroneously determine that the conviction appealed from is bad on its face.

The decision on a preliminary point is open to review by the King's Bench, if it was a decision (as here) which the Justices at Quarter Sessions had no jurisdiction to arrive at.

No doubt a *certiorari* will not be granted to quash an acquittal where within jurisdiction; but the action of the magistrates here was at the same time a refusal to adjudicate, and an assumption of jurisdiction which they did not possess, viz. to erroneously question a conviction of Petty Sessions.

So also the Court will not quash an order of Quarter Sessions where the Justices are judges of law and fact, and act as such: here they have acted as neither.

[He referred to *Reg.* (*Giant's Causeway Tramway Company*) v. *Justices of Antrim* (1); *Reg.* (*Drohan*) v. *Justices of Waterford* (2); *The King* v. *Allen* (3); *The King* v. *Ridgway* (4).]

There was no appearance for Cornelius Collins, or any of the other parties served with the conditional order.

Cur. adv. vult.

(1) [1895] 2 I. R. 603.
(2) [1900] 2 I. R. 307.
(3) 15 East, 333. [132.
(4) 5 B. & Ald. 527; 1 Dowl. & Ry.

PALLES, C.B.:—

This is an application to make absolute a conditional order for a *certiorari*, to bring up for the purpose of being quashed an order of Quarter Sesssions, made on an appeal from a conviction of Justices at Petty Sessions.

The offence for which the defendant was convicted was that he did "unlawfully assault the complainant by striking him on the face with a stone and cutting him."

The order of Quarter Sessions was—"Order reversed on ground that conviction was bad on the face of it, for not stating the offence for which the accused was convicted."

The first question for our determination is whether the conviction is bad on its face—for if it be, the order of the Quarter Sessions is right, and in that event there would be no ground for the *certiorari*.

The conviction was under 24 & 25 Vict. c. 100, sect. 42, which enacts—"Where any person shall unlawfully assault or beat any other person, two Justices . . . may hear and determine such offence . . . and the offender, upon conviction thereof before them . . . shall forfeit such fine as shall appear to them to be meet, not exceeding, with costs (if ordered), the sum of £5."

By sect. 44, if the Justices at the hearing "shall deem the offence not to be proved . . . , and shall accordingly dismiss the complaint," they make out, and deliver to the party accused, a certificate, which sect. 45 makes a bar to any other proceedings.

The above section does not, in terms, confer a jurisdiction on Justices in cases of wounding or cutting; but every wounding or cutting includes an assault and battery, and it is now settled that the magistrates have jurisdiction under the above section to summarily determine a complaint of assault which in fact includes or was accompanied by wounding. In *Reg.* v. *Walker* (1) and in *The Queen* v. *Elrington* (2), a plea of *autrefois convict*, before Justices, under a corresponding statute was held a good bar to an indictment for felonious stabbing, and a certificate of Justices under a corresponding statute, 9 Geo. 4, c. 21, sects. 27–29, was pleaded in bar with success to an indictment founded on the same

(1) 2 Mood. & Rob. 446. (2) 1 B. & S. 688.

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facts charging malicious wounding and occasioning grievous bodily harm.

In the latter case, Blackburn, J., with his usual good sense, points out that, as now, wounding to be indictable as a substantive crime, different from an assault, need not necessarily be with an instrument; there are few assaults in which there may not be some pretext for saying there was a wounding. To the same effect is *Wilkinson* v. *Dutton* (1).

In *The Queen* v. *Elrington* (2) the information charged only a common assault; but if the jurisdiction of the Justices was not ousted by the fact that the assault complained of included a wounding, I do not see how the statement in the summons and conviction here, that the assault included a cutting, can oust the jurisdiction. It is to be observed that the common form of indictment for a common assault includes a wounding as a matter of aggravation; so here the summons can, if necessary, be read as charging an assault by striking, with a wounding, as a matter of aggravation.

For these reasons, I am of opinion that the Justices had jurisdiction to entertain the complaint. The learned Chairman appears to have been of opinion that the summons contained alternative charges, or more charges than one, and that the conviction being in the terms of, or by reference to it, was uncertain on which charge the conviction was had.

What I have already said shows that I am of opinion that the conviction was for but one single charge of common assault, and consequently that it is good on its face. It follows that the order of the Quarter Sessions is wrong; and as the jurisdiction of the Justices is limited to proceeding according to the course of the Common Law, unless the course has been altered by statute, the error goes to jurisdiction.

That order, it is to be observed, does not proceed to acquit, so we have not to consider the question discussed in the line of cases of which *The Giant's Causeway Case*; *Reg.* v. *Antrim Justices* (3) is one.

In result, then, we have on the records of the Quarter Sessions

(1) 3 B. & S. 821. (2) 1 B. & S. 688. (3) [1895] 2 I. R. 603.

Court an appeal, which the Court had jurisdiction to entertain, which the Court does not appear to have heard, which they certainly have not determined on the merits; but which, as it seems to me, they have declined to entertain upon a preliminary point, which is bad in law.

There, therefore, is no difficulty in our directing them, by mandamus, to proceed to act in the jurisdiction which, for a reason invalid in law, they have declined to exercise; and, as ancillary to that mandamus, we should, in my opinion, remove from the record the invalid order, which, so long as it remains there, constitutes an apparent, although not a real, obstacle to their further proceedings.

Two cases have been referred to by Mr. Doyle, who has afforded us much assistance, which fully support this view: *The King* v. *Allen* (1) and *The King* v. *Ridgway* (2).

I am not to be taken as adopting so much of the decision in the first case as infers that the defendant there by accepting the case stated waived the hearing of his appeal on the merits. To this extent it was not followed in *The King* v. *Ridgway* (2); but it is unnecessary to discuss the question, as here a case has not been stated, and there is no ground for contending that the appeal has been waived; but to the extent that the case was one for *certiorari*, *Allen's Case* (1) was followed in *The King* v. *Ridgway* (2). The report of that case is fuller in the report in Dowling and Ryland than in that in Barnewell and Alderson.

There the defendant had been convicted before Justices under 39 & 40 Geo. 3, c. 106, sect. 4, for attending a meeting of journeymen bleachers, held for the purpose of carrying on a combination for the purpose of obtaining an advance of wages. The defendant having appealed to Quarter Sessions, that Court held that the offence was misdescribed, and quashed the conviction, subject to the opinion of the King's Bench, upon an objection taken to the *form* of the conviction. A rule having been obtained for a *certiorari*, cause was shown, the defendant's contention being that he had been acquitted (whether properly or not, was not the question), and that he was entitled to the benefit of that acquittal, and ought not to be subjected to a second trial.

(1) 15 East, 333. (2) 5 B. & Ald. 527; 1 Dowl. & Ry. 132.

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The Court, which included Lord Tenterden, intimated a strong opinion that the objection was not tenable, the Sessions having expressly qualified their decision by declaring that they had quashed the conviction for *form*, just as here they say they reverse, as the conviction is bad on its face. Lord Tenterden, in his ultimate judgment, says:—"I am clearly of opinion that we are bound in the exercise of our judicial authority to quash this order of Sessions, if, upon the face of it, it appear to be founded on an insufficient ground, and I should be of the same opinion whether the Sessions had or had not asked our opinion on the question. Supposing no case to have been reserved by the Sessions, but that their order and the original conviction on which it was based had been brought before us on *certiorari*, it would be our duty to read the order; and if we saw by the terms of it that they had quashed the conviction for informality or insufficiency, then to read the conviction, and if we found it not to be informal, then to send it back for re-hearing on the merits." The judgment of Bayley, J., is to the same effect. He says:—"I am of opinion that the conviction was improperly quashed, and that it is our duty to send the appeal back to the Quarter Sessions in order that it may be heard there upon the merits." No doubt Best, J., there bases his judgment upon the conviction having been only conditionally quashed; but the modern case of *Walsall (Overseers of)* v. *London & North-Western Railway Co.* (1), I think, shows that where the reason for making the order is stated on its face, there is no necessity for a case to be stated. The case, thus put by the Chief Justice and Bayley, J., is the present case. We follow the course pointed out by them; we read the conviction and the order which holds it to be bad on its face. We find it is not bad or otherwise informal, and we accordingly send the case back to the Sessions. The answer to *Reg.* v. *Justices of Middlesex* (2) is that there the conviction was quashed on the merits. The rule for a *certiorari* must, therefore, be made absolute; and upon the order being quashed on its return, there must be a mandamus to proceed to hear and determine. This latter order may be absolute in the first instance, as the defendant will have an opportunity of pleading to it, if he so desire.

(1) 4 App. Cas. 30, 467. (2) 2 Q. B. D. 516.

JOHNSON, J.:—

The Justices at Petty Sessions, on the complaint of M'Grath (the prosecutor), under 24 & 25 Vict. c. 100, sect. 42, convicted Collins (the defendant) of a common assault, and fined him 21*s.*, with imprisonment in default of payment of the fine. From that conviction Collins appealed to the Quarter Sessions, pursuant to the Petty Sessions (Ireland) Act, 1852, sect. 24, sub-sect. 3, Form H.; and it was the duty of the Quarter Sessions (sub-sect. 16) to entertain the appeal, with jurisdiction to confirm, vary, or reverse the order of the Justices at Petty Sessions, as certified to the Quarter Sessions under sub-sect. 3. On the appeal coming before them, the Court of Quarter Sessions held that the conviction at Petty Sessions was "bad on the face of it for not stating the offence for which the accused was convicted," and on that ground, by their order, which tells its own story on its face, reversed the order of the Justices at Petty Sessions. There are, therefore, now two questions for decision: (1) Was the decision of the Quarter Sessions right in law? and (2) if not, has this Court jurisdiction to quash this order of the Court of Quarter Sessions by *certiorari*, bearing in mind the provisions of sect. 72 of 24 & 25 Vict. c. 100, and to issue a mandamus to the Quarter Sessions to enter continuances and hear and determine the appeal?

Form H. sets out the summons and complaint of the prosecutor, under 24 & 25 Vict. c. 100, sect. 42: that Collins (the defendant) "did unlawfully assault the complainant by striking him on the face with a stone and cutting him." The term "cut" or "cutting" does not appear in the 24 & 25 Vict. c. 100, in the offences to the person which are dealt with by that Act. The summons did not state a charge of felonious assault, or of an indictable misdemeanour of actual or grievous bodily harm, or a felonious wounding. It stated plainly, an unlawful assault coupled (by describing how the assault complained of was committed) with circumstances of aggravation; it might have stated the charge concisely, "did unlawfully assault and beat the complainant"; or in the more elaborate and usual terms of an indictment for a common assault, "did on the (complainant) make an assault, and the said (complainant) did then beat, wound, and ill treat, and other wrongs to the said (complainant) then did." In the summons in question, in the

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present case, for the misdemeanour of a common assault, under 24 & 25 Vict. c. 100, s. 42, it was not necessary that the summons should set out the circumstances of aggravation; and, though it did so, it was not necessary to prove them. See *R.* v. *Taylor* (1), and there are many authorities to the same effect. If the Justices at Petty Sessions had been of the opinion that on the evidence before them the charge was from any circumstance a fit subject for indictment, they should have abstained from summary adjudication (24 & 25 Vict. c. 100, sect. 46); and as the Justices at Petty Sessions did not do so, we are to take it that their opinion in the present case, after they had heard and considered the evidence, was that it was not a fit subject for indictment, and that they thereupon dealt with the case as one of common assault within their summary jurisdiction, as, in my opinion, was plainly stated in the summons. On the first question for decision, therefore, I think there is no solid objection to the form of this conviction, and that the Quarter Sessions were wrong in their decision in point of law, and that that decision was an excess of jurisdiction.

Then as to the second question for decision. This Court is not a Court of Appeal from Quarter Sessions, and if the Court of Quarter Sessions had, within their jurisdiction, heard and decided the appeal on its legal merits, or merits in fact, though their adjudication might have been wrong in our opinion, yet this Court could not interfere by *certiorari* or require them to re-hear the appeal which they had heard and decided; but if on a preliminary objection, no matter at what stage of the case made (*Reg.* v. *Browne* (2)), the Quarter Sessions erroneously hold on their mistaken view of the law in the construction of the conviction (and set that out on the face of their order), "because the conviction does not state the offence for which the accused was convicted" (which, in the opinion of this Court, it does state), and, without exercising their jurisdiction to hear and determine the appeal on the merits, either of law or fact (as was their duty), reverse on this preliminary objection the order of the Justices at Petty Sessions, that is an erroneous declining to exercise their jurisdiction; and therefore I think a writ of *certiorari* should issue to bring up and quash

(1) L. R. 1 C. C. 194. (2) 7 El. & Bl. 757.

that order of Quarter Sessions, and that a writ of mandamus should issue to the Quarter Sessions to enter continuances, and hear and determine the appeal: *R.* v. *Ridgway* (1); *The Queen* v. *Mayor of Monmouth* (2); the cases cited, Short on Mandamus, p. 302, note (*f*). The distinction between the present case and *The Queen* v. *Justices of Middlesex* (3) is, that in that case the Sessions did not refuse to enter into the appeal on the ground of any preliminary matter. They did enter upon and heard the appeal fully, and decided it upon its legal merits, viz. that the acts of the defendants set forth on the conviction did not, according to their view, bring the case within the statute on which the conviction was had; here the preliminary objection was that the Quarter Sessions had not jurisdiction to hear and determine the appeal, because the offence for which the accused was convicted did not appear on the conviction, and the Quarter Sessions yielded to that preliminary objection, and, therefore, declined jurisdiction.

GIBSON, J.:—

I agree that the summons was correct, the conviction regular, and the reversal manifestly erroneous. The decision being in a criminal case, in favour of the accused, and pronounced by a Court having jurisdiction, can this Court quash the order of Sessions on *certiorari* and award mandamus to enter continuances to hear and determine the appeal on the merits?

There are two points for consideration—1, what is the construction of the order of reversal? 2, is the order one which, on its true construction, allows the remedy of *certiorari* and mandamus?

1. The ground of reversal stated is that the conviction is bad on its face for not stating "the offence for which the accused was convicted." The difficulty in getting at the meaning of the reason so assigned is that no matter how we understand the words, the ground is wrong. The most probable construction is that the Sessions read the summons as charging two separate offences, and therefore uncertain, and that the conviction was held bad by reason of not showing the particular offence of which

(1) 1 Dowl. & Ry. 132. (2) L. R. 5 Q. B. 251. (3) 2 Q. B. D. 516.

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Collins was found guilty. The affidavit of the prosecutor's solicitor, if admissible, expressly states that the reason orally given was that the conviction was in respect of alternative charges. Whether such cases as *Reg.* v. *St. Peter's, Droitwich* (1); *Reg.* v. *Widecombe* (2); *Reg.* v. *Leeds* (3): which decide that in settlement cases an ambiguous order of the Court may be explained by evidence, apply to such a case as the present, I need not consider, as without any explanation the terms of the order invite the construction I have stated.

2. On this construction of the reversal are *certiorari* and mandamus available?

The general principle of our jurisprudence is that a decision in favour of an accused person in a proceeding is final, so far as that proceeding is concerned. There are some exceptions to this, founded on special statutes, or want of jurisdiction, &c., which do not here apply.

I propose to deal with the question first on principle before referring to the authorities in which orders of reversal were quashed.

If this prosecution had been dismissed without prejudice at Petty Sessions on the mistaken ground that there was no jurisdiction to deal with the case summarily under 24 & 25 Vict. c. 100, s. 42, or because the summons disclosed no offence at all, or that it was not in time, it would be clear that mandamus, without accompanying *certiorari*, could be awarded to compel the determination of the case: *Reg.* v. *Handsley* (4); *Rex* v. *Beard* (5); *Reg.* v. *Browne* (6); *Reg.* v. *Tyrwhitt* (7). The same remedy could be given if the dismissal was based on grounds which the Justices could not lawfully consider: *Reg.* v. *De Rutzen* (8); *Reg.* v. *Cotham* (9). If the summons was dismissed on the erroneous ground that it charged two offences (as here), would such dismissal be a declining to determine according to law? No authority on this has been brought to our notice. The test stated by Coleridge, J.,

(1) 9 Q. B. 886.
(2) *Ibid.* 894.
(3) *Ibid.* 910.
(4) 8 Q. B. D. 383.
(5) 12 East, 673.
(6) 7 E. & B. 757.
(7) 15 Q. B. 249.
(8) 1 Q. B. D. 55.
(9) [1898] 1 Q. B. 802.

in *Reg.* v. *Browne* (1) is, Do the Justices say that whatever they think of the merits, they are not at liberty to give judgment because they are unable to enter into the question? The test appears to me to apply to the hypothetical case, and I think that if the Petty Sessions had dismissed, without prejudice, this summons, without hearing the case, on the ground that it complained of two offences and was uncertain, this Court could have compelled the Justices to hear the complaint; and if the dismissal had been with costs, they could have quashed the order so illegally made, which, by manifest error, imposed an illegal payment on the prosecutor: *Reg.* v. *Cassidy* (2).

If the Justices entertained the case and convicted, but the Quarter Sessions, mistakenly holding that they had no jurisdiction, or that the summons disclosed no offence, or on some other preliminary point, reversed the conviction and dismissed the case without prejudice, would not the latter Court, though they make an affirmative order of reversal, decline jurisdiction to determine the appeal according to law, just as much as the Justices would have done had they dismissed on the same ground? Whether a point is preliminary or not is not affected by the circumstance that the case is of a civil or criminal nature.

Where, however, the summons being regular and correct, the Quarter Sessions, though so holding, profess to reverse the conviction for some supposed error in the conviction itself in point of form (such as that it varies from the offence charged, or omits some material element), and where it appears on the face of their reversal that the reason was wrong, this might not be a preliminary point, though informality only was relied on, and the merits had never been considered. There would be, no doubt, manifest error, but it would be error in the hearing of an appeal properly before them. Assuming that error lies in a criminal case in favour of the prosecutor—it was allowed without objection in *Reg.* v. *Chadwick* (3); *Reg.* v. *Millis* (4) (both cases of judgment for the accused on special verdict); and *Reg.* v. *Houston* (5), on demurrer—a point which in principle appears doubtful—the

(1) 7 E. & B. at p. 762.
(2) 6 Ir. L. R. 436.
(3) 11 Q. B. 205.
(4) 10 C. & F. 534.
(5) 2 Cr. & Dix. 191; 4 Ir. L. R. 174.

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function of this Court on *certiorari* is not that of a Court of error, and the reversal of an erroneous judgment on error absolves the accused at common law from the possibility of a right judgment being substituted: *Reg.* v. *Houston* (1); *Rex* v. *Bourne* (2); *Reg.* v. *Silversides* (3). Mandamus in such case would be impossible. There would have been a hearing and determination on a matter within the Justices' jurisdiction, though the ground of reversal by the Justices was informality only. Where, however, the order of reversal was wrong in part, and such part was severable, as if costs were erroneously awarded against the prosecutor, it would seem that such part might be quashed without affecting the acquittal portion of the order: *Reg.* v. *Cassidy* (4).

In my opinion the jurisdiction of this Court here depends on the question whether the Sessions declined jurisdiction on a preliminary point—the defective nature of the charge. If they so declined, they can be compelled to hear the appeal, and *certiorari*, which is hardly necessary, is only ancillary to mandamus to get rid of an erroneous record. In *Reg.* v. *Justices of West Riding of Yorkshire* (5) mandamus was granted to erase a mistaken entry.

I now turn to the cases where orders of reversal by the Sessions were quashed on *certiorari*.

In *Rex* v. *Allen* (6) the Sessions erroneously treated the informal minutes of a conviction as the conviction proper, and quashed the formal conviction returned by the Justices as irregular without going into the merits. On a case reserved by the Sessions the King's Bench quashed this reversal, and declined to send the appeal back to be disposed of, because they considered that the appellant had waived his right. Whether the Court was right in holding the appeal on the merits to have been waived may well be doubted, though Lord Mansfield adopted the same course in *Reg.* v. *Houston* (1)—a civil case. The case decides that on a case reserved an order of reversal by the Sessions may be quashed, and the case remitted to be decided on the merits. The reversal by the Sessions was based on the mistaken idea that the true

(1) 4 Ir. L. R. 174.
(2) 7 A. & E. 58.
(3) 3 Q. B. 406.
(4) 6 Ir. L. R. 436.
(5) 5 Q. B. 1.
(6) 15 East, 333.

conviction was not the conviction at all, and that it was not the conviction appealed against. They, without jurisdiction, substituted the minutes for the conviction as the subject of appeal, and never considered the conviction at all.

The next case is *Rex* v. *Ridgway* (1). There the Sessions, without hearing the merits, quashed a conviction as wrong in form because it used the words "for the purpose of obtaining," instead of the words "to obtain." The conviction followed the words of the information in describing the offence. On a case reserved the King's Bench quashed the reversal, and sent the case back to Sessions to hear the appeal. The order of Sessions was, in its essence, a conditional judgment only. The Sessions by their case made the order a speaking order, showing its reasons: *Walsall Overseers* v. *London & North-Western Railway* (2). The Court were authorized to deal with the order provisionally made subject to their decision, and they remitted the case without mandamus. Though the Common Law is the same in the two countries, I am not aware of any reference in any book or case to the existence of any practice of Sessions stating cases in Ireland for the decision of this Court, and there is, I believe, no example of any such case.

The report of *Rex* v. *Ridgway* in 1 Dowl. & Ry. 132 attributes to Abbott, C.J., the opinion that, irrespective of any case reserved, his conclusion would have been the same. This important statement is not to be found in 5 B. & Ald. 527; and in Paley and in Dickinson the case is explained as proceeding on the conditional nature of the decision below. Construing the statement as meaning that the Sessions held that the charge showed no statutory offence, I think that it supports my conclusion that an erroneous decision on a preliminary point of form warrants *certiorari*. This is probably the true effect of the Chief Justice's opinion. If, however, it imports that where the conviction is mistakenly quashed by Sessions, not because the charge was wrong, but for some supposed defect of form in the conviction itself, though the reversal is intended to be final—no case being reserved—

(1) 5 B. & Ald. 527. (2) 4 App. Cas. at p. 40.

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error on the face of the reversal authorises *certiorari*, I cannot find any other authority supporting such view, or that mandamus would lie in such case as if the ground of reversal was on a preliminary point. The distinction between an erroneous decision and a failure to determine according to law is often difficult to apply, as Wills, J., remarks in *Reg.* v. *Cotham* (1). *Reg.* v. *Justices of Essex* (2) is a case of this class.

Another case where an order of reversal was quashed was *Reg.* v. *Boultbee* (3). It is not in point, as the Court considered the Sessions had acted without jurisdiction. Another case where *certiorari* was allowed in respect of an order of Sessions quashing a conviction is *Reg.* v. *Spencer* (4); but the result of the case is not disclosed in the report.

The last material case that I have found is *Reg.* v. *Middlesex Justices* (5), where the Court held that an erroneous decision by Sessions on the form of a conviction was not a decision on a preliminary point, and could not be the subject of mandamus. If it is regarded as a decision on the legal merits of the appeal, it is not in point here, nor should I be disposed to question the decision if the Sessions holding the charge in the information to be correct quashed the conviction erroneously because it was, as they thought, wrongly drawn up. But if they quashed it because the information disclosed no statutory offence, and the conviction based on it was therefore bad, the decision would seem opposed to the view of the Court in *Reg.* v. *Ridgway* (6) and to principle. If the Justices below had dismissed the case on such ground, it plainly would have been a preliminary point. Would it cease to be such because it is the ground of an erroneous reversal by the Sessions? If the Sessions reversed because there was no jurisdiction to entertain the case at all, the point would certainly be preliminary. *Reg.* v. *Ridgway* (6) was not cited. The *ratio decidendi* of the Court applies to civil as well as criminal proceedings. If Sessions reversed an order of Justices in a civil case on the erroneous ground that the summons showed no lawful demand, or was out of time,

(1) [1898] 1 Q. B. at p. 806.
(2) 11 Q. B. D. 704.
(3) 4 A. & E. 498.
(4) 9 A. & E. 485.
(5) 2 Q. B. D. 516.
(6) 1 Dowl. & Ry. 132.

and the order showed the error on its face, would not *certiorari* and certainly mandamus be available? I do not think that because the Sessions are an Appeal Court, and can reverse on appeal, that a ground of reversal which, if advanced as ground of dismissal below would be preliminary, loses that character when adopted by the Sessions. For, however, the reasons already stated, *Reg.* v. *Middlesex* (1) is distinguishable.

In this case I base my decision on this, that the Sessions failed to determine the appeal according to law when they held that a proper and regular summons was invalid, and declined to entertain the appeal, holding that the conviction, following the supposed invalid summons, was vitiated by the same defect.

The section of the statute taking away *certiorari* does not apply, as it relates only to conviction, and leaves the right of a prosecutor complaining of an unlawful dismissal unaffected.

Solicitor for the prosecutor: *Thomas Kelly.*

J. L.

FAIT *v.* BEGGS (2).

Practice—New trial—Admission of illegal evidence—Action for slander—Substantial wrong or miscarriage—R. S. C. (Ir.), Order XXXIX., R. 7.

The defendants, husband and wife, were sued for slander spoken by the defendant, Mrs. B., of the plaintiff. Mrs. B. at first denied the speaking of the words; but afterwards, at the invitation of S., Mrs. B. wrote two apologies, one to S. and another to A., a person implicated; but did not apologise to the plaintiff. B. was not present when the apologies were written, and there was no evidence that he was aware of the apologies. B. subsequently made an offer of £10 to the plaintiff to settle the case, accompanied with a threat if she did not accept the offer. At the trial the speaking of the words was proved by two witnesses, and neither of the defendants was examined. The Judge admitted the apologies as evidence, subject to objection. The jury found a verdict for the plaintiff. On motion for a new trial:—

(1) 2 Q. B. D. 516.

(2) In the King's Bench Division, before PALLES, C.B., and GIBSON, J.

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Held, by the King's Bench Division, that the apologies signed by Mrs. B. were not evidence against her husband, and the Court ordered a new trial.

Held, by the Court of Appeal (affirming the decision of the King's Bench Division), that the apologies of the wife were not admissible in evidence; but, *held*, further, that even if the apologies were wrongly admitted, there was evidence without them sufficient to sustain the verdict; that no substantial wrong or miscarriage had been occasioned in the trial; and that the verdict should stand.

ACTION by the plaintiff, a widow, against the defendant, James Beggs, and his wife, for slander spoken by Mrs. Beggs of the plaintiff, imputing unchastity to her. The slander consisted of a charge that Mrs. Beggs had seen Mrs. Tait and Mr. A. misconducting themselves on the grounds of Mr. Slater, the headmaster of the school of Drumulla in the county of Louth. Mr. Slater met Mrs. Beggs and her husband, and told her that he had heard she had made the statement. Mrs. Beggs repudiated it. Subsequently Slater wrote out two apologies, one to Mr. A., and the other to himself, which Mrs. Beggs signed. Her husband was not present when these were signed, and there was no evidence that he knew anything about them. The plaintiff refused to accept these apologies when they were offered to her, without an apology to herself. The action was tried before Kenny, J., and a common jury on the 13th December, 1904.

The first witness—a Miss Henry—became hysterical, and had to retire. Mrs. Toombs, the next witness, stated that she met Mrs. Beggs in April or May. "She spoke words to me much the same as you read it." [This referred to what was written on a piece of paper handed to the witness, and which formed the subject-matter of the amended statement of claim.] She said she heard that about Mrs. Tait from Mrs. Beggs.

Miss Henry, recalled, stated that she had heard Mrs. Toombs' evidence: it was much the same Mrs. Beggs told her. Mrs. Tait had a house from Mrs. Henry—witness's mother—at the sea.

The plaintiff stated that she went to Omeath in April, 1904, and she was only a fortnight in the house she had taken when Mrs. Henry gave her notice to quit. Mrs. Henry stated that she had heard bad stories about the plaintiff.

Mr. Slater, the master of Drumulla school, stated that he was

present when Mrs. Beggs signed a document. [The apology of 31st May, 1904, offered in evidence.] Mr. O'Shaughnessy, K.C., for the defendant, objected, though he admitted that the matter of it was the same as the subject-matter of the present case.

His Lordship admitted the document subject to objection.

The witness stated that he wrote a letter to Mrs. Beggs on the 21st May, 1904. This letter was admitted subject to objection. The witness was then asked—"What was the story?" Mr. O'Shaughnessy, K.C., objected; and his Lordship admitted the evidence subject to objection. The witness stated—"That I found Mrs. Tait and a man from Newry in my grounds misconducting themselves, and that I had turned them out. I heard it from Father Doyle. It was for that the apology was written."

On cross-examination he stated that he mentioned the matter to Mrs. Beggs, her husband being present, and she repudiated it. Subsequently the witness wrote out the apologies—one to himself, and the other to Mr. A.—and Mrs. Beggs signed them; her husband was not present at the time.

The plaintiff, on being recalled, stated: "The rector sent for me and read the two apologies; I asked, 'Where is mine?' He said 'Won't these two do?' I said, 'Not at all'"; and the interview terminated. The plaintiff further stated in her evidence: "I was offered £10 by Mr. Beggs. He said he would bring witnesses and other charges against me, if I did not settle." The Judge gave leave to amend the statement of claim by allowing the plaintiff to rely on the language deposed to by Mrs. Toombs. The defendant called no witnesses. The jury found that the defendant, Mrs. Beggs, uttered the words complained of, and that the words imputed unchastity to the plaintiff, and they assessed damages at £100.

The defendants moved for a new trial.

O'Shaughnessy, K.C., *Henry, K.C.*, and *Dickie*, for the defendants.

Serjeant Dodd and *Williamson*, for the plaintiff.

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PALLES, C.B.:—

This was an action of slander against husband and wife, for words spoken by the wife, made actionable by the Slander of Women Act, 1891. The statement of claim does not contain any cause of action against the wife alone. The liabilities of the parties and the procedure in the action must therefore be that of the old Common Law action which, before the Married Women's Property Act, 1882, was the only remedy for such a wrong, and which it is now well settled will lie, notwithstanding that Act: *Seroka* v. *Kattenburg* (1); *Earl* v. *Kingscote* (2); *Beaumont* v. *Kaye* (3).

At the trial the plaintiff tendered in evidence, and the learned Judge received (subject to the objection of the defendants' counsel), (1) a written apology signed by the female defendant; and (2) a declaration by the male defendant.

The questions for our determination are whether the objections to this evidence are well founded. We are of opinion that it is settled by authority that the apology of the female defendant was not admissible.

Denn v. *White and Wife* (4) was an action against husband and wife for mesne profits. A judgment in ejectment had been previously obtained against the wife, the ejectment not having been served on the husband. This judgment was offered in evidence against the husband, and the learned Judge having refused to receive it, and the plaintiff being unable to prove any trespass without it, was non-suited. On a motion to set aside the non-suit, it was held that the evidence had been rightly rejected, the Court saying, "The wife's confession of a trespass committed by her could not be given in evidence to affect her husband in an action in which he is liable for damages and costs."

So in the correlative case, where the husband and wife are plaintiffs, it has been frequently held that, although the action is for a debt which accrued due to the wife *dum sola*, an admission by her in reference to it, made after marriage, is inadmissible against the husband. For instance, in *Hall* v. *Hill* (5), an action

(1) 17 Q. B. D. 177.
(2) [1900] 2 Ch. 585.
(3) [1904] 1 K. B. 292.
(4) 7 T. R. 112.
(5) 2 Str. 1094.

for wages earned by the wife, the Chief Justice would not allow the wife's owning the receipt of £20 to be given in evidence against the husband. So, too, in *Alban* v. *Pritchett* (1), an action by husband and wife in right of the wife as executrix, it was held that declarations of the wife could not be given in evidence for the defendant. There Lord Kenyon said:—"He (the defendant) has an interest in the cause, and that cannot be prejudiced by any . . . act of the wife; and it is immaterial whether his right be or be not *jure uxoris*. It is still his right." *Kelly and Wife* v. *Small* (2), before Lord Kenyon, is also to the same effect.

Humphreys v. *Boyce* (3) was a case of a different class. The action there was not against husband and wife, but against the husband as administrator of his wife. Evidence of admissions by the wife after marriage, that the money remained due, was objected to by Sir J. Scarlett, who said that Bayley, J., in a cause tried before him at Carlisle, "had held such evidence to be inadmissible, on the authority of a case decided by Lord Kenyon, of which he had a note," doubtless *Kelly and Wife* v. *Small* (2). To this it was answered that in the case at bar the character of husband was out of the question: the defendant was sued merely as administrator of his wife, and on a cause of action which, had she outlived him, would have survived against her. Lord Tenterden agreed in this view, saying—"The defendant's character of husband has nothing to do with the present action. The wife, like any other person, may bind her administrator." He accordingly offered to receive the evidence, but it was ultimately not pressed. That case, therefore, is not an authority for the plaintiff here.

These cases are not touched by *Moriarty* v. *London, Chatham, and Dover Railway Company* (4). There the acts given in evidence were those, not of the wife, but of the husband; acts done in the conduct of the action itself. The observation there of Blackburn, J., that "What the plaintiff said is always admissible," is no more than the statement of a general rule. But that general rule is

(1) 6 T. R. 680.
(2) 1 Esp. 715.
(3) 1 Mood. & Rob. 140
(4 L. R. 5 Q. B. 314.

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subject to exceptions which were unnecessary to be considered there, and of which that in the present case is one.

Notwithstanding this case, those I have already referred to appear to me to be good law, and to rest on sound principle. They have never been expressly questioned; and they, or some of them, have been referred to in all the modern books on Evidence, such as Taylor, Starkie, Powell, Phillips, and Roscoe.

It is impossible to say that the admission of this evidence did not cause substantial miscarrriage. It was undoubtedly of weight in proving the innuendo, and may have materially increased the damages. I may paraphrase the Earl of Halsbury's words in *Bray* v. *Ford* (1) by saying it is enough for me to say that "an important and serious topic," which ought not to have been admitted, has been submitted to the jury.

Upon this ground the verdict must be set aside, and the case must go to a new trial.

It is right, however, that we should determine the second question, the admissibility of the declaration of the husband. This we think is admissible (*Moriarty* v. *London, Chatham, and Dover Railway* (2)) on the ground that he is the *dominus* of the defence. The wife could not defend otherwise than by joining in his defence, and her estate might be charged by his default in taking defence. There must be a new trial; defendants' costs of former trial, and of this action, to be their costs in the action. The plaintiff to bear her own costs.

GIBSON, J., concurred.

J. L.

Appeal. May 10, 16.

The plaintiff appealed (3).

E. Cuming (*Serjeant Dodd* with him), for the appellant:—

The Married Women's Property Act, 1882, does not abolish the liability of the husband for his wife's wrongful acts, and the

(1) [1896] A. C. 44. (2) L. R. 5 Q. B. 314.

(3) In the Court of Appeal, before FITZGIBBON, WALKER, and HOLMES, L. JJ.

plaintiff may sue the husband and wife jointly, or the wife alone, for wrongs committed by her after her marriage: *Seroka* v. *Kattenburg* (1).

There was sufficient evidence to sustain the verdict, even if the apologies had not been admitted in evidence. The evidence given by the plaintiff when she was recalled, as to the conversation she had with the defendant, Beggs, when he offered £10 to settle, was tantamount to an admission by Beggs that the slander had been uttered. Though where there is no evidence to affect a defendant, the mere fact that he is not called is not in itself sufficient to sustain a verdict against him; yet if there is some evidence against him, then the circumstance that he is not called to explain it may be enough to turn the scale, and sustain the verdict: *M'Kewen* v. *Cotching* (2); *Wilcox* v. *Gotfrey* (3). There may be an admission by conduct that a party has a bad case: *Moriarty* v. *London, Chatham, and Dover Railway Company* (4).

But even admitting that the apologies should not have been admitted, there has been no substantial wrong or miscarriage within the meaning of Ord. XXXIX., Rule 7, and the Court will not order a new trial: *Bray* v. *Ford* (5).

O'Shaughnessy, K.C., *Henry, K.C.*, and *Dickie*, for the respondents:—

The apologies written by the wife without the knowledge or consent of her husband are not evidence against the husband, and should not have been admitted. In an action brought by husband and wife for a debt due to the wife *dum sola*, any admission respecting it made by the wife after marriage is inadmissible against the husband: *Kelly* v. *Small* (6). Declarations by the wife cannot be given in evidence in an action by husband and wife in right of the wife as executrix: *Alban* v. *Pritchett* (7). A recovery in ejectment against the wife cannot be given in evidence in an action against the husband and wife for mesne profits: *Denn* v. *White* (8). The wife's owning receipt of money is no evidence

(1) 17 Q. B. D. 177.
(2) 27 L. J., Ex. (N. S.) 41.
(3) 26 L. T. (N. S.) 481.
(4) L. R. 5 Q. B. 314.
(5) [1896] A. C. 44.
(6) 1 Esp. 715.
(7) 6 T. R. 680.
(8) 7 T. R. 112.

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against her husband: *Hall* v. *Hill* (1). [They also referred to *Bray* v. *Ford* (2) and *Beaumont* v. *Kaye* (3).]

FITZ GIBBON, L.J. :—

This case is of practical importance as to the principles which guide the Court in applying Order XXXIX., R. 7. The action was brought against a husband and wife to recover damages for slander spoken by the female defendant, imputing unchastity to the plaintiff, and therefore actionable. The husband was joined, not as a wrong-doer, but to answer in damages for the tortious act of his wife.

The facts of the case are simple enough. The plaintiff, Mrs. Tait, who lived at Rostrevor, complained that Mrs. Beggs spoke and published words imputing immorality to her. The words set out in the statement of claim were not those actually used, but at the trial it was proved that Mrs. Beggs had stated to two ladies that Mrs. Tait and a man had been caught in a certain shrubbery in a questionable position, and that the owner had turned them out of his place in consequence of what he saw. The words proved were capable of the meaning that Mrs. Tait and her companion were expelled for conduct inconsistent with her chastity. The two gentlemen concerned—the man alleged to have been in Mrs. Tait's company, and the owner of the place—first gave some publicity to the matter, with the view of having Mrs. Beggs' story contradicted. On the occasion when it was first mentioned by Mr. Slater, the owner of the place, Mrs. Beggs and her husband were both present, and she then "repudiated the charge altogether," apparently meaning that she denied having made it.

The next stage in the proceedings was that, through the intervention of a clergyman, two documents were drawn up, and were signed by Mrs. Beggs to the effect that the statement was without foundation, and apologising for it. One of these apologies was given to each of the gentlemen. Mr. Beggs was not present on that occasion, and it is not proved that he knew of the apologies having been signed. When they became known to Mrs. Tait she complained that there was no apology for her, and she threatened

(1) 2 Str. 1094. (2) [1896] A. C. 44. (3) [1904] 1 K. B. 292.

proceedings. The defendant, James Beggs, thereupon went to the plaintiff and offered her £10 to settle the matter, and he used words to her on that occasion to the effect that if she did not accept the £10 he would fight it out, and would bring evidence to show either that she was unworthy of credit, or that the charge was true—"he would bring witnesses and other charges against me, if I did not settle." She refused the offer, and the case went to trial. The apologies signed by Mrs. Beggs were tendered and pressed as evidence for the plaintiff, and were admitted subject to objection.

The main contention for the defendant at the trial, in the King's Bench and here, namely, that the wife's apologies were not admissible against the husband unless he was a party to them, or at least knew of them, has not been seriously controverted, and is supported by old authorities. He was present when his wife repudiated the statement, and he was not present when the apologies were written or signed. But he offered £10 to the plaintiff, after he knew that she was threatening proceedings, which she threatened because no apology had been made to her; and it is very probable that he knew of the apologies to the gentlemen; but we cannot act on presumption, and we must take it that the husband was not a party to the apologies, and that they were not admissible against him.

Neither of the defendants was called as a witness. The jury found that the words bore an actionable meaning, and found a verdict for the plaintiff with £100 damages. The King's Bench granted a new trial on the ground of admission of illegal evidence, namely, the apologies.

We have been pressed to say that a new trial should not be granted in consequence of the provisions of Order XXXIX., R. 7. The rule is, in terms, mandatory against a new trial on the ground of the improper admission of evidence, unless in the opinion of the Court some substantial wrong or miscarriage has been thereby occasioned in the trial.

In the present case, on the issue of the meaning of the words, I cannot see that the wife's apologies could materially affect the finding, which is sustained by the act of the husband himself in offering the plaintiff £10 to settle the case, and threatening to

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bring witnesses and other charges against her if she did not settle. He did not contradict the plaintiff's evidence that he did this, and his offer and threats showed that he treated his wife's words as defamatory and actionable in their meaning.

The only other matter as to which any wrong or miscarriage could have been occasioned by the improper admission of the apologies was the amount of damages. If the verdict for £100 damages is a substantial wrong or miscarriage occasioned by the admission of the apologies, the Court ought to send the case to a new trial; but unless we are of opinion that it is so, the Rule says that "a new trial *shall not* be granted." *Bray* v. *Ford* (1) was cited as an authority for a new trial; but in that case the plaintiff, who was a solicitor, sued for damages for libel, the charge being that he had illegally taken payment for his professional services while he held the fiduciary position of a governor and the vice-chairman of a college. The language used against him, and the mode of publication of the charges, could not be withdrawn from the jury as evidencing malice, and being seriously defamatory, and the jury found for the plaintiff with £600 damages. The Judge told the jury that the plaintiff was entitled to charge profit costs, but the House of Lords held that he could not receive them, being himself intrusted with the government of the institution, and the Lords ordered a new trial on the ground of misdirection, and declined to consider what influence the miscarriage might have had upon the amount of damages. Lord Halsbury said that the substantial wrong was that the defendant was not permitted to present his case with the argument that his original complaint was true.

But is it possible to say, in the present case, that there has been a substantial wrong or miscarriage in the assessment of damages, or that the admission of the apologies substantially affected the damages? The conduct of Beggs himself in offering the considerable sum of £10 to settle the case, accompanied by the threat that if it was not accepted he would produce evidence either of justification, or to depreciate the plaintiff's character, entitled the jury to give substantial damages, especially when he did not present himself as a witness. His wife's apology to the men,

(1) [1896] A. C. 44.

when he himself offered no apology to the woman, could not, in my opinion, be held to have the effect of making a verdict for £100 a substantial wrong or miscarriage, when, on the uncontradicted evidence of the husband's own conduct towards the plaintiff, I cannot say that the verdict is *per se* unjustifiable.

If the order of the King's Bench putting the costs of the first trial on the plaintiff were to stand, and if the case were sent to a new trial, the necessary result would be that, unless the next jury gave even more than £100, the plaintiff, as the result of the action, would get no compensation for the wrong inflicted upon her. In my opinion the Rule applies; the verdict and the damages are sustained by sufficient admissible evidence; the admission of the apologies has occasioned no substantial wrong, and the plaintiff is therefore entitled to judgment.

WALKER, L. J. :—

The question in this case depends upon the application to the facts of the provision in the General Order that "a new trial shall not be granted on the ground of the improper admission of evidence, unless in the opinion of the Court some substantial wrong or miscarriage has been thereby occasioned in the trial."

I think, therefore, that the Court must be of opinion, not by guess or speculation, but by judicial inference, that the same verdict would have been returned if the evidence had not been admitted.

I think in this case we must assume that the wife's apology was improperly admitted, and further there is no evidence on which we can act to connect the husband with the giving of it. There was no evidence given at the trial which proved the slander specifically complained of in the statement of claim, but a Mrs. Toombs swore that the female defendant told her that Mrs. Tait and Mr. A. were lying together on Mr. Slater's grounds on the grass, and that Mr. Slater objected to it in his grounds.

The learned Judge, on application, gave leave to amend the claim by substituting what Mrs. Toombs had proved, and this involved the necessity of establishing as a part of the plaintiff's

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case (1) that Mrs. Toombs' evidence should be acted on; and (2) that the statement imputed unchastity.

As to the first point, as Mrs. Toombs' evidence was specific, and neither of the defendants was examined to contradict her, I think the speaking of the words complained of by the amended claim was so clearly proved, taking into account the husband's threat to Mrs. Tait, that no substantial wrong was occasioned so far by the admission of the apology.

Secondly, I agree that the apology did put on what the wife said the construction of imputing unchastity; but, then, was not the same apparent by the words actually used as proved? I do not see how any jury could understand them in any other sense, and when the husband is proved to have offered £10 to Mrs. Tait to settle the action, and to have said if she did not—"He would bring witnesses and other charges against me," and he does not come forward to contradict the plaintiff, and therefore admits he made such a statement, how can we say a substantial wrong was done by admitting the wife's apology?

I agree that the view of the Court must go beyond speculation; but on the evidence of Mrs. Toombs and the husband, I do not see how the jury could arrive at any other conclusion than they did, if the apology had been rejected. I concur with the learned Judge that the threat of the husband was the cause of the damages being so large, and in one sense an apology mitigates the damages.

Every case in which the General Order is sought to be applied must depend on its own circumstances. In *Bray* v. *Ford* (1), the ruling of Cave, J., at the trial went to the very foundation of the case. Mr. Bray had charged that Mr. Ford had illegally and improperly charged profit costs, and he added to his statement comments which undoubtedly would be construed as libellous. The learned Judge ruled that the charging of profit costs was legal and proper, and, therefore, from the very first Bray was making a false charge. Lord Watson puts it clearly when he says: "The whole imputations in his letter of February 26th, 1894, which are said to be libellous, arise out of, and are strung upon, the allegation that the respondent's

(1) [1896] A. C. 44.

acceptance and retention of full remuneration for the professional services rendered by him to the college were in violation of the law. The text or basis of these imputations was in point of fact true; but the case went to the jury on the footing that it was false. It is plain that the learned Judge did not regard its falsity as an immaterial feature of the case, which the jury had to consider. He told the jury:—'In my judgment he' (*i.e.* the respondent) 'was not making a profit illegally or improperly; and if it was not illegal or improper, of course Mr. Ford could not know that it was either, and that does impute to him conduct which, if it were true, would no doubt tend to lower him in public estimation, and properly so tend.'"

In the present case the slander and its meaning are established, without the apology, by such evidence that a jury could not reasonably have arrived at any other conclusion than they did, and the damages, according to the view of the Judge who presided, were based on the threat of the husband.

Upon the whole, I think it would be unjust to both parties to have another trial; and when I come to that conclusion, it is just the case for the application of the General Order, and serves its object.

HOLMES, L. J.:—

This action was brought against a husband and wife for language spoken by the latter imputing want of chastity to the plaintiff. Two witnesses proved the use, by Mrs. Beggs, of words, which would, I think, convey to ordinary men and women the imputation that the plaintiff had misconducted herself with a gentleman, Mr. A., in the grounds of a Mr. Slater, who had detected them in the act. It appeared from further evidence given on behalf of the plaintiff that Mr. Slater, having heard of this statement, wrote an indignant letter to Mrs. Beggs, saying that it was without foundation, and threatening proceedings. Mrs. Beggs seems at first to have denied, in the presence of her husband, that she had made the statement; but, subsequently, through the intervention of the rector of the parish, she signed two documents—one addressed to Mr. Slater, the other to Mr. A.—admitting the use of the slanderous words, and

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apologising for them. A few days later the plaintiff's solicitor wrote to Mrs. Beggs preparatory to the present action; and immediately before or after the issue of the writ, the male defendant offered the plaintiff £10, and told her that he would bring witnesses and other charges against her if she did not settle. The defendants' counsel objected to the admission in evidence of the two apologies, but called no witnesses; and the jury found for the plaintiff, assessing the damages at £100. Although there is little moral doubt that Mrs. Beggs acted with the sanction of her husband in writing to Mr. Slater and Mr. A., there was no legal proof of this; and for the reasons given by Palles, C.B., I am of opinion that the Judge ought not to have allowed the letters to be given in evidence. But under the Judicature Rules this will not entitle the defendants to a new trial, unless, in the opinion of the Court to which the application is made, some substantial wrong or miscarriage has been occasioned by the reception of the illegal evidence. This is a very valuable provision when properly applied, as its object is to prevent one of the greatest hardships in legal proceedings—an unnecessary second trial.

I am unable to agree with the Chief Baron in the conclusion arrived at by him in this branch of the case. I am satisfied that, taken in connexion with the other circumstances, the letters of apology cannot be regarded as introducing an important and serious topic, and that they did not affect the result. The issues of fact were whether the words were spoken, and if so, whether they imputed want of chastity to the plaintiff. The affirmative of the first was proved by two witnesses, who were not cross-examined on this point; and as Mrs. Beggs was not called, the jury would certainly have found for the plaintiff on both. Mr. Dickie has suggested, with some frankness, that if the letters had not been produced, the female defendant might have been called as a witness. This was not only possible but probable; and it is not improbable that she would have denied the use of the words, or the defamatory sense imputed. She would then have been cross-examined on her own admissions; and the jury would have at once rejected her testimony. Therefore, they did not affect the findings of the issues of fact. It is said that they

may have increased the damages. Readiness to apologise is generally relied on as a mitigating circumstance in actions for defamation; but in this case it is argued that the apologies to the two gentlemen emphasized, to the disadvantage of the defendants, the absence of an apology to the plaintiff. I find, however, that the evidence on this subject was given by Mrs. Tait in reply to the defendants' counsel on cross-examination, and if, as I gather from the questions, the defendants' case was that they were ready to apologise to the plaintiff, it would have been easy for them to prove it.

Furthermore, there is another circumstance which furnishes me with a convincing argument that the wife's admissions led to no miscarriage. I refer to the stronger admission made by the husband in offering money to settle the action, and by threatening to bring witnesses and other charges if it was not settled. I cannot conceive a more emphatic admission that defamatory language had been used, which, if the action proceeded, the defendants would seek to justify; and I agree with Kenny, J., that this must have influenced the jury in assessing damages. *Bray* v. *Ford* (1) is wholly unlike the present case. In it the leading statement of the alleged libel was that the plaintiff had improperly taken remuneration while acting as a trustee or quasi-trustee. This, accompanied by strong comments, was the ground-work of the charges made by the defendant, who pleaded justification. As a matter of fact the plaintiff had received remuneration, but the Judge ruled at the trial that he was not disqualified from taking it. This put an end to the defence of justification; and once it was held that this ruling was erroneous in law, a verdict for the plaintiff could not stand. The striking contrast of that case with the present confirms me in the view that the verdict of the jury and the judgment of Kenny, J., ought to be restored.

Solicitors for the plaintiff: *John F. Small & Co.*
Solicitor for the defendants: *Robert Dickie.*

R. D. M.

(1) [1896] A. C. 44.

K. B. Div. *Probate.* 1905. Feb. 20.

In the Goods of ELIZABETH JANE EYRE, Deceased (1).

Directions to destroy will—Revocation—1 Vict. c. 26, s. 20.

A testatrix, in a letter addressed to her daughter, which was signed by her in the presence of two witnesses, directed her will to be destroyed :—

Held, that the letter was a writing declaring an intention to revoke the will, though, not being of a testamentary character, it was not admitted to probate; but liberty was given to a next-of-kin to apply for a grant, as in the case of intestacy.

Motion.

Elizabeth Jane Eyre, widow, on the 21st day of July, 1892, duly executed a will, whereby, in exercise of a power of appointment contained in her marriage settlement, dated 19th March, 1850, she appointed the proceeds of a policy of life assurance to her daughter, Ellen Stannard Eyre, for her sole and separate use absolutely, and devised and bequeathed all her real and personal estate to her said daughter, Ellen Stannard Eyre, and appointed her sole executrix.

On the 20th November, 1902, the said Elizabeth Jane Eyre wrote the following letter to her daughter, Elizabeth Ellen Moore Garrett :—

"Dearest Bessie,—Send enclosed on. My will is to be destroyed, and your father's kept safe.

"Elizabeth J. Eyre.

"*20th November*, 1902.

"Witnessed by—

"E. S. Masters,

"Cherry A. L. Forde,

"7, Ridgway Gardens, Wimbledon."

E. S. Masters was the widow of E. Stewart Masters, and the daughter of the deceased, and the person to whom the above letter was addressed. She afterwards married James Hugh Moore

(1) Before Andrews, J.

Garrett. An affidavit was made by her, proving the signature of the letter in the presence of herself and of Cherry A. L. Forde.

Jellett, K.C., moved the Court for an order that Elizabeth Ellen Moore Garrett might be at liberty to apply for a grant of administration intestate of the personal estate and effects of the said Elizabeth Jane Eyre, deceased, or, in the alternative, for a grant of letters of administration of the said personal estate and effects, with the said letter, dated 20th November, 1902, annexed. He referred to *In the Goods of Hubbard* (1); *In the Goods of Hicks* (2); *In the Goods of Fraser* (3); *In the Goods of Durance* (4).

Whelan, for Elizabeth Stannard Eyre.

ANDREWS, J., made the following order:—

"ON motion of counsel for Elizabeth E. Moore Garrett, and on reading copy notice of motion, filed the 16th day of February, 1905, and the copy affidavit of the said E. S. Moore Garrett, filed the same day, and the documents therein referred to; and on hearing counsel for Ellen S. Eyre, and it appearing to the Court so deciding that the paper writing, dated the 21st day of April, 1892, purporting to be the last will of the said Elizabeth Jane Eyre, was revoked by the paper writing, dated the 20th day of November, 1902, referred to in the said affidavit, which last-mentioned paper writing the Court decrees to be a writing declaring an intention to revoke the said will, but not itself to be of a testamentary character, It is ordered by the Court that the said Elizabeth E. Moore Garrett, as a lawful daughter and one of the next-of-kin of the said deceased, be at liberty to apply for a grant of letters of administration of the personal estate of the said deceased, as in the case of intestacy; and the Court doth declare the said Ellen S. Eyre, executrix of the deceased named in the said will, entitled to her costs of this application out of the assets of the said deceased; and it is ordered that the said Elizabeth E. Moore Garrett be at liberty to retain her costs of and incidental to this application out of the assets of the said deceased, in case she shall extract such grant."

Solicitors for E. S. Moore Garrett: *French & French.*
Solicitor for Ellen S. Eyre: *H. Malley.*

W. I.

(1) L. R. 1 P. & D. 53.
(2) *Ibid.* 683.
(3) L. R. 2 P. & D. 40.
(4) *Ibid.* 406.

Appeal. 1905. June 26–28.

CLEMENTS *v.* THE COUNTY COUNCIL OF TYRONE (1).

(1904. No. 6932.)

Local Government—County Council—Repair of guard walls—Obstruction of high road—Independent contractor—Casual or collateral negligence—Grand Jury Act (6 & 7 *Wm.* 4, *c.* 116), *ss.* 50–56—*Local Government Act*, 1898 (61 & 62 *Vict. c.* 37), *ss.* 4, 72—*Procedure of Councils Order*, 30*th January*, 1899, *Articles* 19, 20, 22, 23—*Local Government Board* (*Ir.*) *Provisional Order Confirmation Act*, 1901 (1 *Edw.* 7, *c.* cxli), *s.* 15.

A County Council employed an independent contractor to take down and rebuild portions of the guard-wall of a public road. The public road was 20 feet 9 inches in breadth, was bounded on either side by a wall, and had no grass fringes between the carriage way and the bounding walls. The land at the other side of the damaged wall being private property, there was nowhere but the public road itself on which to place debris from the wall and materials for its reconstruction. No provisions were inserted in the contract obliging the contractor to fence, protect, or light any materials which he might, in the course of the work, be obliged to place on the road; neither did the County Council take any steps to ensure that such precautions would be adopted. The contractor placed a heap of debris and materials on the road, from 2 to 2½ feet high, extending out 8 feet from the wall under repair, and, in fact, covering the wheel-track on one side. He left the heap in this position at night, without any lights, fencing, or protection of any kind. The obstruction caused a school cart, on which the plaintiff was travelling after dark, to upset, and the plaintiff was thrown out and injured:—

Held, that the County Council, as a "road authority," has not the immunity formerly possessed by the Grand Jury, but is bound to see that reasonable precautions for the safety of those lawfully using a public highway are taken when repairs are being executed on the highway; that the negligence of the contractor, in placing the obstruction on the highway, and leaving it unlighted and unfenced, was not casual or collateral negligence, but negligence in doing the thing contracted for, and that therefore the County Council was liable in an action for negligence.

APPEAL by the defendants from the decision of the King's Bench Division, reported, *ante*, p. 415, where the facts are fully stated.

(1) Before LORD ASHBOURNE, C., and FITZGIBBON and HOLMES, L.JJ.

Wylie, K.C., and *Patchell, K.C.* (with them *Gaussen*), for the appellants.

Henry, K.C., and *Horner, K.C.* (with them *Muldoon*), for the respondent.

In addition to the cases cited in the Court below, the following were referred to:—*Knight* v. *Fox* (1); *Overton* v. *Freeman* (2); *Pickard* v. *Smith* (3).

Cur. adv. vult.

June 28.

LORD ASHBOURNE, C. :—

This is an appeal from the King's Bench Division, and raises important questions as to the liability of County Councils for accidents on roads caused by obstruction, for which they are alleged to be responsible.

The plaintiff in the case admittedly sustained damage by being upset at night in his car when lawfully using a public road in Tyrone, by reason of the obstruction of a heap, of the existence of which he was ignorant, and which was not lighted, or watched, or guarded. He brought an action against the Tyrone County Council to recover damages for the injuries he sustained. The action was tried at the Spring Assizes of 1904 before Lord Justice Walker and a special jury. Counsel for the County Council asked the learned judge for a direction on the ground that the County Council were not liable for the illegal act of Boyle, their contractor, committed by him in violation of his duty. Lord Justice Walker refused to give any such direction, and the jury returned a verdict for £200 damages.

The appellants then moved in the King's Bench Division to set aside the verdict and judgment, and to have a verdict and judgment entered for the defendants. The King's Bench Division—the Court being composed of the Lord Chief Baron and Andrews and Johnson, JJ.—after full consideration, affirmed the verdict and judgment; and from that order this appeal has been brought.

(1) 5 Exch. 721. (2) 11 C. B. 867. (3) 10 C. B. (N. S.) 470.

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CLEMENTS v. TYRONE CO. COUNCIL.

Lord Ashbourne, C.

The case has been very fully and ably argued before us, and we have been referred to all the authorities likely to assist our judgment, and which were fully reviewed by the Lord Chief Baron and his colleagues in the King's Bench Division.

The main arguments addressed to us by the appellants were three—that the County Council had no greater responsibility than the Grand Jury; that having engaged an independent contractor to do the work, they were not liable; that the accident was caused by the casual and collateral negligence of the contractor. I am not able to accept any of the contentions of the appellants. The County Council has quite a different position to that occupied by the Grand Jury. It is a Corporation with continued existence. The County Council, unlike a Grand Jury, were, to use the Chief Baron's words, "not only authorised to execute the work in question, but a duty was imposed on them to do it. They had power to appoint officers to see that their duties were properly carried out; and a fund was provided for the payment of damages for acts of misfeasance in carrying out those duties." If they permitted or caused obstructions to be placed upon a road for the purposes of repair, it would be only under the condition that due care was used that such obstructions should not be a source of danger to the public lawfully using the road, and—as was said by A. L. Smith, L.J., in one of the cases—that no injurious consequences, such as should be foreseen in the natural course of things, would result.

As to the second contention, it must be borne in mind that we now know that the County Council could have made these repairs either by contract or by direct labour. They made it by a contract, which is set out in the case, and does not indicate in any of its provisions that the contractor should be mindful of the care of the public, and guard against all dangers that might result to the public from any obstruction to the road or its traffic. I think it would be most dangerous, and opposed to public policy, that such a road authority as a County Council could divest itself of all responsibility in such a case as the present by employing a contractor who might be inexperienced, or careless, or too poor to pay any damages. I am not struck by the allegation that the accident was caused by the contractor's casual and collateral negligence. It

is not very easy to exactly define what is meant by the phrase; but I think that the obstruction in this case was caused by negligence and misfeasance in doing the very act which the contractor was engaged for, and should have been foreseen and guarded against in the natural course of things.

When the case is understood, it does not appear to be either complicated or difficult. A resident in the county lawfully and properly using the road sustained damage by an obstruction placed on the road, for the repair and maintenance of which the County Council were responsible. That obstruction was neither lighted nor guarded, and nothing was done to warn or protect the public by day or night in the ordinary use of the road; and I can see no reason why the road authority should not be held liable.

The authorities, in my opinion, strongly support this conclusion; and I need only refer to the cases of *Hardaker* v. *Idle District Council* (1); *Dalton* v. *Angus* (2); *Mersey Docks Trustees* v. *Gibbs* (3); *Hughes* v. *Percival* (4); *Holliday* v. *National Telephone Company* (5); and the Irish cases—*Levingston* v. *Guardians of Lurgan Union* (6); *Wheeler* v. *Board of Works* (7). I am deeply impressed by the weighty words of Lord Halsbury in *Holliday* v. *National Telephone Company* (5):—"It appears to me that the Telephone Company, by whose authority alone these works were done, were—whether the works were done by the Company's servants or a contractor—under an obligation to the public to take care that persons passing along the highway were not injured by the negligent performance of the work."

Concurring, as I do, in the order of the King's Bench Division, I do not think it necessary further to discuss the case. The appeal should be dismissed with costs.

(1) [1896] 1 Q. B. 335.
(2) 6 App. Cas. 740.
(3) L. R. 1 H. L. 93.
(4) 8 App. Cas. 443.
(5) [1899] 2 Q. B. 392.
(6) I. R. 2 C. L. 202.
(7) [1903] 2 I. R. 202.

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FITZ GIBBON, L.J. :—

The Lord Chief Baron has left nothing to be said upon the authorities, and I might content myself by adopting the last page of the judgment of Johnson, J., as a sufficient statement of my opinion.

I rest my decision upon two propositions :—First, that it is the duty of the "road authority" to use reasonable precautions for the safety of those lawfully using a public highway; and, secondly, that under the Local Government Act, 1898, the Irish County Councils do not enjoy the immunity from actions which the Grand Juries formerly had, but occupy the same position of responsibility which was established by the House of Lords in the case of *The Mersey Docks Trustees* (1).

The case may be ruled, in my opinion, in the very words of the head-note of *Hill* v. *The Tottenham Urban District Council* (2), where the defendants were constituted under the analogous legislation for England.

> "Where a public body takes upon itself the making up of a road, such work being of itself, unless carefully done, likely to be dangerous to the public, a duty is cast upon such public body to see that no dangerous obstructions are allowed to exist to passengers passing along the road. That duty cannot be evaded by employing a contractor to carry out the work."

Bruce, J., there held that the case was governed by *Penny* v. *The Wimbledon Urban District Council* (3), another English "road authority." He said :—

> "It seems to me that the determination of the case depends upon the question, and the answer to the question—Does the making up of a road cast upon the authority making it up the duty of taking care that no obstruction—at least, no dangerous obstruction—shall be offered to the public? It seems to me that the answer to that question must be 'Yes.' You cannot make up a road without having imposed on you the duty of taking care that in the work of making up the road no danger or no injury shall be offered to the public. It is quite clear that the moment you begin to alter a road, or break it up, or do anything to the surface of the road, unless it is carefully done, there must be danger to the public. Therefore, when the local boards take upon themselves the

(1) L. R. 1 H. L. 93. (2) 79 L. T. (N. S.) 495. (3) [1898] 2 Q. B. 212.

making of the road, there is a duty imposed on them of taking care that no dangerous obstructions are allowed to exist to passengers passing along the road. If that be so, they could not evade their duty by employing a contractor to make up the road. If there was a duty imposed on them, and I think there was, they could not escape that duty by employing a contractor."

In this case Boyle's contract was "to repair, where necessary, the broken-down parts of the wall on James M'Crory's contract," that is to say, the wall or fence of the public road the surface of which James M'Crory had contracted to keep in repair. The specification, and the proved circumstances, show that this contract to repair the wall involved considerable interference with the roadway. The foundations for the new work were to be sunk to a depth of two feet below the level of the road-surface, and excavations were to be made of sufficient depth to obtain a solid *stratum* of either rock, gravel, or hard clay. The broken-down parts of the wall, which was 9 feet high and 2½ feet thick, were to be taken down so far as necessary. The specification further shows that the wall was formed of large stones. The materials to be employed, and the work to be done, necessarily involved an extensive use of the surface of the road during the carrying out of the contract. The roadway was only 21 feet wide from wall to wall, barely sufficient space for the passage of two carts, without any footpath, fringe of grass, or waste space on either side, where materials might be left until used, replaced, or removed. It was physically impossible to put anything on the adjoining land, which was 9 feet above the road, and the roadway was the only place where the contractor could put the excavated stuff, or the taken-down stones, or the materials for the new wall, during his operations.

The work, therefore, in its very nature, involved the temporary and partial obstruction of the highway to some extent, and the negligence which caused the injury consisted—and consisted only—in going too far out, and in leaving the obstruction unlighted, unfenced, and unwatched—in short, in taking no precautions to protect or warn the public against a danger incidental to the performance of the contract.

It seems to me that the question whether any particular act is "casual or collateral negligence of the contractor," or "negligence

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in doing the thing contracted for," is not a question of law but a question of fact, and in this case, in my opinion, the injury was caused by misfeasance in the performance of work which necessarily involved some degree of obstruction of the highway, and consequently of danger to the public, and in which, therefore it was the duty of the defendants to see that reasonable precautions were taken, and they are responsible as well for their own neglect of this duty, as also for the negligence of the contractor in doing the dangerous work which they entrusted to him.

I entirely reject the contention that the fact that the act of the contractor was a criminal offence deprived it of its actionable character as against the defendants as employers, or rendered it "casual or collateral negligence" on the part of those who actually did the mischief.

The case is completely within the principle stated by the Lord Chief Baron in the earlier portion of his judgment, provided the County Council is in the same position as the English road authorities. But I desire to reserve my opinion upon the applicability or extent of the "even broader" principle to which he refers at p. 426 of the report of his judgment.

Assuming that the contract did not authorise the contractor to place the materials on the road, he indicates the opinion that the defendants, even in that case, would be liable, because "any one having any knowledge whatever of the mode in which road contractors ordinarily work would know" that the terms of the contract "would not be adhered to," and in support of what he describes as a "broader principle," he quotes a passage from Lord Halsbury's judgment in *Holliday* v. *The National Telephone Company* (1), holding the Company to be "*under an obligation* to the public to *take care* that persons passing along the highway were *not injured* by the *negligent performance* of the work" *by a contractor*. With all respect, I am not satisfied that Lord Halsbury intended by the words which the Lord Chief Baron has italicised to indicate any broadening of employer's liability beyond that which was described in the same case by A. L. Smith, L.J., where he said (at page 400):—

(1) [1899] 2 Q. B. 392.

"I do not agree that this was a case of mere casual and collateral negligence within the meaning of that term, for it was negligence *in the very act which Highmore was engaged to perform.*"

I hesitate to broaden the responsibility of employers by imposing upon them the duty to *anticipate* negligence on the part of their servants. Whether any particular act is, or is not, "casual or collateral negligence," or is, or is not, "negligence in the performance of the work," is the material question, and I am not prepared to complicate that question by considering whether the employer's duty extends to measuring the degree of carelessness which his servant is to be expected to display.

The second proposition on which I base my judgment is that our County Councils hold the same position as the English road authorities, and have not the immunity formerly possessed by the Grand Juries. In my opinion, Grand Juries were not responsible for damages for two reasons: first, because their duty was simply to present the necessary money, and they had no duty, and no power, to superintend or carry out the work. Secondly, their duty terminated with the fiating of the presentment, and their existence ended immediately afterwards, when they were discharged. Every thing else was done either by county officials or by "contractors." "Grand Jury contracts" is a misleading expression, the Grand Jury made no contract, the contractor's obligation was a crown bond. But the County Councils are permanent bodies, with powers to levy rates, and with duties to discharge by means of the money raised. In my opinion, the principle laid down in the case of *The Mersey Docks Trustees* (1) applies to them, and on this point I have nothing to add to the judgment of the Lord Chief Baron.

I do not act on the suggestion of Andrews, J., when he says (p. 441):—

"On the assumption that it was *obligatory* upon the defendants to have the work of repairing the wall in question executed by contract, there being no exception taken either to the contract or the contractor, I was not, and would not as at present advised be, prepared to hold that the defendants were responsible for the contractor's negligence in leav-

(1) L. R. 1 H. L. 93.

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ing the obstruction on the road, unlighted and unguarded, whereby it became a danger to those lawfully using the road."

I do not think that the introduction by the Provisional Order of May 8, 1901, confirmed by 1 Edw. 7, c. cxli., of facilities for the employment of "direct labour," was intended to alter the duty, or to increase the liability, of County Councils where they continue the practice of employing contractors. If there be any case in which their whole duty, and their only power, is to make a contract, it may be that they will not be under any further liability. But it has already been held, in *Westropp's Case* (1), that their duty towards the public with respect to the maintenance of roads is not discharged by the mere making of contracts.

HOLMES, L.J.:—

We have the advantage in this case of an exhaustive analysis by the Judges of the Divisional Court of the authorities bearing on the several questions that have been discussed. I have carefully considered these authorities; but to repeat what has been already done so fully and clearly would, in my opinion, be "wasteful and ridiculous excess." It is, I believe, now well settled that if a corporate body is given authority by statute to interfere with, or to do any work on, a public highway, there is implied, as incidental to the exercise of such authority, an obligation to take due care that such action or work on their part will not be a source of danger to the public lawfully using the highway, and that the corporate body cannot get rid of this obligation by employing a contractor to carry out the authorised work. Applying this principle to the present case, I find that the defendants have not merely statutory authority, but are placed under a statutory duty to keep in proper order and condition the public roads in their county; and the contract with Edward Boyle was entered into in furtherance of this duty. It appears that where one of the highways under their control ran through a cutting, the retaining boundary wall on one side of the road had broken down, and that the object of the contract was to have the damaged

(1) [1904] 2 I. R. 569.

portions of the wall removed and rebuilt on new foundations. I agree with Palles, C.B., that the contract necessarily contemplated that the old materials taken from the wall, the soil excavated, and such new materials as were required, should be placed upon the road, and should remain there for some time. It would have been almost impossible to do the work in any other way; and this mode of performing it would be perfectly legal, provided proper precautions were taken to protect the public from danger. It has been argued on behalf of the defendants that the contract gave Boyle no authority to place the materials on the road, and that his doing so was both illegal and criminal. It has been further argued that at the least he had no authority to leave them there during the night. I am unable to accept these arguments. He could have placed the materials on the road, and guarded and lighted the place of deposit in such a way as to remove all appreciable danger. On the other hand, he might be negligent in this respect, as actually happened; but the negligence would not be outside or independent of the contract. It would be negligence in doing work which the defendants were authorised to do, and which they had delegated to the contractor.

According to the authorities, the defendants are responsible for such negligence, unless there is something exceptional in the position of the County Council; something that relieves them from the obligation which attaches to other corporate bodies having a statutory authority to interfere with highways. The main argument on this branch of the case is that County Councils in their business relating to public roads are successors of the Grand Juries; that the Local Government Act in transferring this business to County Councils placed no greater obligation on these bodies than previously attached to the Grand Juries; and that admittedly the latter could not have been made liable in an action of this kind. I have nothing to add to what Palles, C.B., has said on this branch of the case. His reasoning, and the authorities referred to by him, demonstrate that the County Councils stand in the same position as to liability for acts of negligence as attaches to other corporate bodies.

This case was argued in the Divisional Court on the assumption, afterwards found to be false, that the defendants could not

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have done the work in question by their own servants, and were obliged to carry it out by contract. Andrews, J., seems to have thought that if this had been so, there might have been a different result. I offer no opinion on this point, which has not been argued on the appeal.

Solicitor for the plaintiff: *Andrew C. Leitch.*
Solicitors for the defendants: *Dickie & Carson.*

G. Y. D.

Appeal. 1903. Dec. 17.

HAMILTON *v.* LONG.

Seduction—Services to father and mother—Child born after death of the seduced girl's father—Action by her mother.

APPEAL by the plaintiff from the judgment of the King's Bench Division—[1903] 2 I. R. 407.

Drummond, K.C., and *Horner*, for the appellant.

Cooke, K.C., and *Gaussen*, for the respondent.

THE COURT (Lord Ashbourne, C., and FitzGibbon, Walker, and Holmes, L.JJ.) affirmed the order of the King's Bench Division, and dismissed the appeal.

Solicitor for the appellant: *P. Maxwell.*
Solicitor for the respondent: *Sir H. Miller.*

R. D. M.

ATTORNEY-GENERAL, INFORMANT; RICHARD CECIL M'MAHON SMYTH AND CHARLES CALDWELL FENTON, DEFENDANTS (1).

K. B. Div. 1905.

Jan. 17, 18. Feb. 24.

Revenue—Estate duty—Settlement estate duty—Marriage settlement—Death of settlor within twelve months from execution of settlement—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* (1) (*c*)—*Statute—Construction—Incorporation of section of former statute with omission of certain words.*

Estate duty is payable upon the death of a settlor in respect of property included in an ante-nuptial settlement executed by him, within twelve months before his death, on the marriage of his son, for which settlement there was no consideration in money or money's worth, although no estate for his life, or for any period determinable by reference to his death, is reserved to the settlor by the settlement.

Where a statute incorporates a section of a former statute, and directs that it is to apply as if certain words were omitted therefrom, the incorporated section is not to be construed as if such words had never existed therein.

The principle of *The Attorney-General* v. *Lamplough* (3 Ex. D. 214) applied.

INFORMATION by the Attorney-General claiming, on behalf of the Crown, estate duty and settlement estate duty.

The facts, as appearing from the information and answer, were as follows:—

By indenture, dated the 23rd April, 1895, made between William Cole Bayly, of Tullow, in the county of Carlow, of the first part, George Henry Bayly, of the same place, of the second part, Ellen Muir, of the third part, and the defendants, of the fourth part (being a settlement made in contemplation of a marriage then intended between the said G. H. Bayly and the said Ellen Muir), the said W. C. Bayly, as settlor, granted to the defendants and their heirs certain lands in the county of Kilkenny, then in the actual occupation of the said W. C. Bayly, and held by him in fee-simple, to hold to the defendants and their heirs to the use of the said W. C. Bayly and his heirs until the said intended marriage, and after the solemni-

(1) Before PALLES, C.B., and JOHNSON and GIBSON, JJ

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zation thereof to the use of the said G. H. Bayly during his life, or until he should become bankrupt, &c., or should assign or encumber the same, &c., and after the failure or determination of the said trust to the use of the defendants in fee-simple, upon trust if the said Ellen Muir should be then living, and should have issue then living by the said G. H. Bayly, at his death to allow her to receive the income during her life, or until she should re-marry, or until such issue should all die without having obtained a vested interest under the trust in default of appointment thereinafter contained, or until she should become bankrupt, &c., or assign or encumber the same, &c.; and it was provided that after the failure or determination of the trust thereinbefore declared, if the said G. H. Bayly should be then living, the defendants might, if in their absolute discretion they so thought fit, apply the income of the premises, or any part in their discretion, towards the maintenance and personal support of the said G. H. Bayly, or the said Ellen Muir, or any wife he might thereafter marry, or any issue for the time being in existence, whether by the said intended or any future marriage, or such one or more of such persons, in such manner as the defendants should think fit during the remainder of the life of the said G. H. Bayly, and should apply the residue of the income during such remainder of the life of the said G. H. Bayly, in the manner in which the same would be applicable if he were then dead; and after the failure or determination of the said trust thereinbefore declared in favour of the said G. H. Bayly and the death or re-marriage of the said Ellen Muir should hold the trust premises to the use of all or such one or more of the issue of the said intended marriage as the said G. H. Bayly should by deed or will appoint, and in default of and subject to any such appointment to the use of all the children of the intended marriage in fee-simple as tenants in common in equal shares, with cross limitations over on death of sons under twenty-one or daughters under twenty-one and unmarried. In the event of all the children dying under twenty-one, and in the case of daughters without having been married, the ultimate remainder in fee was limited to the settlor.

The marriage was duly solemnized, and there was issue. W. C. Bayly died on the 2nd August, 1895, within twelve months

from the execution of the settlement. G. H. Bayly died on the 1st July, 1901, leaving his wife Ellen Bayly and one child, issue of the marriage, surviving him.

The Commissioners of Inland Revenue assessed the estate duty payable on the death of W. C. Bayly, in respect of the lands comprised in the settlement, at the sum of £86 16*s.*, and the settlement estate duty at the sum of £20 18*s.*, exclusive of interest. The informant claimed payment of these sums with interest thereon respectively at the rate of 3 per cent. per annum from twelve months after the death of W. C. Bayly.

The defendants in their answer contended that no estate duty or settlement estate duty became payable on the death of W. C. Bayly in respect of the lands in question, on the grounds that the indenture of the 23rd April, 1895, was not a disposition purporting to act as a gift *inter vivos* within the meaning of section 2 (1) (*c*) of the Finance Act, 1894, or the enactments incorporated therewith, nor did the property become otherwise liable to either of such duties under any of such enactments; that the indenture was an ante-nuptial settlement made by W. C. Bayly for valuable consideration proceeding to him, viz.: the marriage then agreed upon between his son and Ellen Muir, and was contracted for by him on the treaty for such intended marriage; that possession and enjoyment of the lands was assumed by the persons claiming under the settlement immediately upon the solemnization of the marriage to the entire exclusion of W. C. Bayly or of any benefit to him by contract or otherwise; and that no interest in the property subject to the settlement, for life or any other period determinable by reference to death, was reserved either expressly or by implication to W. C. Bayly, nor did he reserve to himself the right by the exercise of any power to restore to himself or to reclaim the absolute interest in such property.

The Right Hon. John Atkinson, K.C. (*Attorney-General*) (with him *Campbell, K.C.* (*Solicitor-General*), and *Coll*), for the informant:—

We submit that the effect of sect. 2, sub-sect. 1 (*c*), of the Finance Act, 1894, is to render the property comprised in the marriage settlement liable to estate duty and settlement estate

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duty on the death of William C. Bayly: *Miles* v. *The Queen* (1). The fact that a disposition is contained in a marriage settlement does not prevent it from being a gift. In *Attorney-General* v. *Jacobs Smith* (2) it was held that a disposition in a marriage settlement in favour of persons to whom the marriage consideration did not extend, was a voluntary disposition and subject to account duty. That case was decided under the 38th section of the Customs and Inland Revenue Act, 1881, as amended by sect. 11 of the Customs and Inland Revenue Act, 1889, which enactments applied only to voluntary dispositions. If the word "voluntary" is omitted, as provided by sect. 2, sub-sect. 1 (*c*), of the Act of 1894, it follows from the principle of *Attorney-General* v. *Jacobs Smith* (2), that the disposition in the present case is a gift. Lopes, L.J., in his judgment in that case (p. 351), considers the question then before them almost academic since the Act of 1894, under which Act, he says, nothing turns on the expression "volunteer." In *In re Donelan's Estate* (3) it was held that trustees of a marriage settlement were purchasers for valuable consideration for the purpose of claiming the benefit of sect. 12 of the Customs and Inland Revenue Act, 1889, which bars the claim for succession duty after twelve years. The first ground on which FitzGibbon, L.J., puts his judgment in that case is that in the Succession Duty Act of 1853, the words "money or money's worth" were used, and that these words were abandoned in the Act of 1889. But in sect. 3 of the Finance Act, 1894, the consideration necessary to bring the case within the exception created by that section is expressly stated to be "money or money's worth." In *In re Lombard* (4), Palles, C.B., states (p. 631) that where the consideration is marriage only, the case is outside the exception in sect. 3 of the Act of 1894. It may be argued that although the case is not within the exception in sect. 3, yet the duty is not payable, since the case does not come within sect. 2 at all, inasmuch as the transaction is not a gift, but a purchase for valuable consideration. This argument, however, ignores the express provision in sub-sect. 1 (*c*) of sect. 2, striking the words

(1) Soward on Estate Duty, 4th ed., p. 55.

(2) [1895] 2 Q. B. 341.

(3) [1902] 1 I. R. 109.

(4) [1904] 2 I. R. 621.

"voluntary," "voluntarily," and "volunteer," out of the 38th section of the Act of 1881, as amended by the 11th section of the Act of 1889. If the defendants' contention is right, no effect is given to this provision. In *Fryer* v. *Morland* (1), Jessel, M.R., treats marriage consideration as a gratuitous title for the purpose of the Succession Duty Act. That Act, and the Finance Act, 1884, are, we submit, in *pari materia*, and marriage should be treated as a gratuitous title under the latter Act. [He also referred to *Attorney-General* v. *Johnson* (2); *Attorney-General* v. *Rathdonnell* (3); *Earl Grey* v. *Attorney-General* (4); *Lord Saltoun* v. *Advocate-General* (5).]

S. L. Brown, K.C., and *Horner, K.C.* (with them *Donaldson*), for the defendants:—

The object of sect. 2, sub-sect. 1 (*c*), of the Finance Act, 1894, was to prevent the evasion of duty in cases coming within clauses (*b*) and (*c*) of sub-sect. 2 of the 38th section of the Act of 1881, and to make dispositions under those clauses liable to duty whether voluntary or not. So far, however, as clause (*a*) of the sub-section is concerned, the word "voluntary" is merely tautological and unnecessary, and the omission of the word can make no difference in the construction of the clause: Maxwell on Statutes, 456; *R.* v. *Ingham* (6). To come within clause (*a*), the disposition must operate as a *gift*; and the question turns on the meaning of the word "gift." That word, both in its popular and its legal signification, implies that the transaction is gratuitous. Blackstone distinguishes between gifts and grants thus: that gifts are always gratuitous; grants are upon some consideration or equivalent: 2 Bl. Comm. 440; see also *Cochrane* v. *Moore* (7), at p. 66. In *Fryer* v. *Morland* (1) Jessel, M.R., was dealing with succession duty, the liability to which is based on an altogether different principle from that governing the duties in question here. In *Miles* v. *The Queen* (8) the settlement was clearly a voluntary one, and not

(1) 3 Ch. D. 675.
(2) [1903] 1 K. B. 617.
(3) 32 L. R. Ir. 574.
(4) [1900] A. C. 124.
(5) 3 Mac Q. 659, at pp. 671, 678.
(6) 5 B. & S. 257.
(7) 25 Q. B. D. 57.
(8) Soward on Estate Duty, 4th ed., p. 55.

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made in consideration of marriage. The only statement to be found in any text-book in favour of the contention of the Crown is in Austen-Cartmell on the Finance Acts (3rd ed., p. 18), where it is said that the omission of the word "voluntary" in the context is to bring within the scope of the sub-clause an ante-nuptial settlement made by a father upon a son or daughter, if made within twelve months of the death of the settlor. The authorities, however, cited for that proposition—viz.: *Attorney-General* v. *Jacobs Smith* (1) and *Wheeler* v. *Humphrys* (2)—do not support it. [They also referred to *Attorney-General* v. *Beech* (3); *Baumvoll Manufactur von Scheibler* v. *Gilchreest & Company* (4).]

The Solicitor-General, in reply:—

The fact that the Legislature thought fit, by sect. 3 of the Finance Act, 1894, expressly to except transactions where the consideration was money or money's worth, shows it was intended that the previous section should capture settlements where the consideration was marriage merely, and not money or money's worth. In *In re Lombard* (5) it was not attempted to be argued that the case would not have come within sect. 2, if it had not been for the exception in sect. 3. If the contention of the defendants is right, the extraordinary result would follow that if a man brings property into his marriage settlement, his wife contributing nothing, his property is absolutely exempt from the duty; but if the wife also brings in property, the husband's property is liable to duty to the extent to which it exceeds in value the property brought in by the wife. *Attorney-General* v. *Johnson* (6) and *Attorney-General* v. *Worrall* (7) show that even before the Act of 1894 the Courts in England were taking exception to the principle that nothing was captured by the Acts of 1881 and 1889 except absolutely voluntary gifts. The precise point in question here was decided in *Attorney-General* v. *Holden* (8).

Cur. adv. vult.

(1) [1895] 2 Q. B. 341.
(2) [1898] A. C. 506, at p. 509.
(3) [1899] A. C. 53.
(4) [1892] 1 Q. B. 253, at p. 256.
(5) [1904] 2 I. R. 621.
(6) [1903] 1 K. B. 617.
(7) [1895] 1 Q. B. 99.
(8) [1903] 1 K. B. 832.

PALLES, C.B. :—

The question for determination is whether estate duty is payable upon the death of a settlor, upon property included in an ante-nuptial settlement executed by him within twelve months before his death, on the marriage of his son, which settlement does not reserve to him an estate for life, or for any period determinable by reference to his death, but for which there was no consideration in money or money's worth.

There is no authority directly in point on this question, except, perhaps, *Attorney-General* v. *Holden* (1), which is capable of being distinguished from the present on its facts. I, therefore, in favour of the defendants, treat this case as being one of first impression.

The solution of the question depends upon the construction to be put upon clause (*c*) of section 2 of the Finance Act, 1894 (57 & 58 Vict. c. 30), which is in the following words :—

> "Property which would be required, on the death of the deceased, to be included in an account under sect. 38 of the Customs and Inland Revenue Act, 1881, as amended by sect. 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily,' and a reference to a 'volunteer,' were omitted therefrom."

The property included in section 38 of the Act of 1881 is comprised in three classes, distinguished therein as (*a*), (*b*), and (*c*). Later on I shall have something to say as to classes (*b*) and (*c*); at present I desire to confine myself to the description of class (*a*). This description, as the same is amended by sect. 11 of the Act of 1889, omitting words irrelevant here, is as follows :—

> "Any property taken as a *donatio mortis causa* . . . or taken under a *voluntary disposition* . . . purporting to operate as an *immediate gift inter vivos*, whether by way of transfer, delivery, declaration of trust, or otherwise, which shall not have been *bona fide* made twelve months before the death of the deceased, . . . and property . . . taken under any *gift*, whenever made, of which property *bona fide* possession and enjoyment shall not have been assumed by the *donee* immediately upon the *gift*, and thenceforward retained, to the entire exclusion of the *donor*, or of any benefit to him by contract or otherwise."

(1) [1903] 1 K. B. 832.

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The defendants contend that the proper mode of ascertaining the description of property within this class (*a*), as altered by the Finance Act, 1894, is, by a literal compliance with the direction in the latter Act, to strike out the word "voluntary" from the previous description, and then to construe the description thus modified as if it were contained in an *original* enactment, without regard to its history or evolution, and irrespective of the new context in which it is found. The description thus arrived at would contain the word "gift" as a substantive part, without any controlling context, and therefore, it is argued, would exclude the property in question here.

I am unable to yield to this contention, for two reasons:

1st. Because the legal effect of the description, thus construed, would be identical with that which it would have, had the word "voluntary" not been omitted. Consequently such a construction would fail to give *any* operation to the statutable direction that the description should be read as if that were omitted, and thus would sin against the cardinal maxim which forbids such an interpretation if *any* sensible meaning can be attributed to the words.

2ndly. Because, to gather the true meaning of the description, we must consider the Act of 1894 as a whole; we must ascertain the law as it existed at the time of its passing, and the change which was intended to be effected by it; and, above all, we must learn from the Acts of 1881 and 1889 the meaning of the material word "voluntary," not as if it were divorced from its context, but as it occurs in those Acts; and, by determining its meaning and effect in these, ascertain the purpose for which it is directed to be omitted in the transfer of the description from those Acts to that of 1894.

On the first of these reasons I feel it unnecessary to enlarge. All admit the principle; but the argument is a destructive, not a constructive, one. It answers the defendants' argument, but does not suggest affirmatively the construction we should adopt, which is the real matter in hand. I therefore proceed at once to the second reason.

At the time of the passing of the Act of 1894 there were several death duties: to two of which, "account duty" and "succession duty," I have to call special attention. One of the objects

of the Act of 1894 was to alter and re-adjust all these duties, by imposing a new tax which, so far as it affected persons within certain defined relationships to the deceased, was to be substituted for, *inter alia*, these two theretofore existing separate duties. The property upon which, and the conditions as to exemption subject to which, these two existing duties were leviable were not identical. Consequently, when one comprehensive description of the property to be subject to the new tax was to be substituted for the theretofore separate descriptions, it was convenient that instead of the two existing separate and non-identical sets of conditions of exemption, one single set should be provided which should be applicable to everything within the descriptions of property which should be subjected to the new tax.

The description of property which was to be liable to the new duty, although very comprehensive, was comparatively simple. Theretofore there was a difference in the mode of taxation between real property and personal property, and between property settled and not settled. These distinctions were to cease. The new tax was to be leviable in respect of "all property, real or personal, settled or not settled," which answered a particular description.

Again, the property theretofore liable to one of the previous taxes was limited to personal property of which the deceased was possessed at his death; whilst property, even personalty, of which the deceased was not possessed at his death, if it devolved upon another upon the death, was liable to a different tax (succession duty), calculated in a different manner, and in many cases at different rates. This distinction also was to cease. The criterion of liability to the new tax on "property, real or personal, settled or not settled," was that it passed upon the death, and the statute shows that these words were not limited to property which upon the death passed *from* the deceased. They included property in which there was an estate in *any* person which ceased on the death, if a benefit accrued to another by its cesser. Further, there had theretofore been a duty on personal property aliened by the deceased in his lifetime under circumstances which were deemed by the Legislature to render the alienation a substitute for a will. The description of this property which was to be liable to the new tax was to be extended so as to include realty.

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So much for the property which was to be subjected to the new tax. Now for the conditions of exemption.

One *principle* of exemption at the time of the passing of the Act of 1894 was applicable to both "account duty" and "succession duty"; one which had its origin in the character (as regards the existence, or absence, of consideration) of the instrument under which the property passed from the deceased to the person to whom that property belonged after the death. Each of the taxes was, by its nature, a death duty; neither was a tax on alienation generally, as distinguished from an alienation which was a substitute for a will. Property *bona fide* aliened by the deceased for money or money's worth was not within the purview of either statute. Although such an alienation might be made in anticipation of death, the consideration received in respect of it became the property of the deceased, and, as such, was liable to one or other of the above duties. To subject to taxation both the property whose sale produced that money or money's worth, and that money or money's worth itself, would be, in substance, to impose double taxation on the same property.

Upon the other hand, it had been thought necessary to guard against the duty being evaded by dispositions which, being in their real nature substitutes for wills, were clothed with the form of conveyance for value. The mode in which the Succession Duty, and Inland Revenue, Acts gave effect to this principle and safeguarded the duties against evasion, differed.

The Succession Duty Act made the subject of taxation the "succession," which comprised every disposition or devolution of property by which anyone should become entitled to a beneficial interest in it upon, or at any subsequent period depending upon, the death; and provisions were inserted declaring "succession" to include devolutions of joint property upon surviving joint tenants, and dispositions accompanied by the reservation to the grantor of an interest for life, or for any period ascertainable only by reference to death. From these general provisions the Act excepted *bona fide* sales in consideration of money or money's worth. It is plain that it would have been inconsistent with the entire scope of this Act to have extended this exemption to property derived through a voluntary conveyance. But the exemption was even

more limited than by excluding such instruments. It did not extend to successions created by dispositions in which the consideration was marriage. Such a disposition took out of the settlor's estate property for which his estate did not necessarily receive an equivalent, and this circumstance, coupled with the fact that the title should arise on the death, was deemed sufficient to treat the settlement as if it were voluntary. Thus, the Act was, in the words of Sir George Jessel, M.R., in *Fryer* v. *Morland* (1), one to grant a duty on succession to property by gratuitous title; and the consideration of marriage was treated, for the purpose of the Act, as conferring only a gratuitous title. Under this Act the property here in question would not be taxable, but it would escape taxation, not by reason of the settlement being a disposition for valuable consideration, but because the beneficial interest in the property comprised in it passed on its execution, and not on the death of the settlor, and no estate for life, or for a period ascertainable by reference to his death, was reserved to him.

In reference to account duty, the non-liability could not in strictness be called an exemption. The subject-matter liable to this duty was personal property which had been disposed of by the deceased in his lifetime under circumstances in which the Legislature considered the disposition was a substitute for a will; and all property which was disposed of under circumstances other than those described in the taxing enactment was exempt, not because it had been taken out of the description of the taxable property, but because it had never been within it. The property subject to this duty were the three classes described in sect. 38 of the Act of 1881 as (*a*), (*b*), and (*c*). One characteristic was common to all. The property, to be within any of the classes, should be taken under a "voluntary" disposition. In saying this I do not overlook the decision in *The Attorney-General* v. *Ellis* (2), which attributed to the word "voluntarily" in class (*b*) the meaning of "freely, without compulsion or obligation." But that case was decided upon the authority of *The Art Union* v. *Savoy* (3)—a decision which, after it had been followed in *The Attorney-General* v. *Ellis* (2), was reversed by the House of Lords: *sub nom.*, *Over-*

(1) 3 Ch. D. at p. 681. (2) [1895] 2 Q. B. 466. (3) [1894] 2 Q. B. 609.

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seers of Savoy v. *The Art Union of London* (1). The latter case deprives *The Attorney-General* v. *Ellis* (2) of all authority, and justifies, if it does not require, "voluntarily" being read as the adverb derived from "voluntary," and as meaning "without consideration."

This element of voluntariness being common to dispositions within any of the three classes—(*a*) consists of property taken under a *donatio mortis causa*, or under a voluntary disposition purporting to operate as an immediate gift *inter vivos*, not made three months before the death; (*b*) property voluntarily transferred by its absolute owner to himself and another jointly in such a way that on his death the other should take the beneficial interest by survivorship; and (*c*) property which passed under a voluntary settlement which reserved to the settlor a power of revocation, or an estate for life, or for a period determinable with reference to death.

It is to be observed that the dispositions within classes (*b*) and (*c*) are not, as is that within class (*a*), confined to those executed within a specified period before death, the Legislature evidently having considered that the reservation to the settlor of a life interest *per se* stamped dispositions within classes (*b*) and (*c*) as substitutes for wills. The principle upon which property within these classes was subjected to the tax seems to be the same as that which actuated the Legislature in excluding property passing under a voluntary conveyance from the benefit of the exemption under the Succession Duty Act.

The distinction, however, remained that the consideration of marriage in the dispositions under which the property was derived was sufficient to prevent it being liable to account duty, as distinguished from succession duty.

In a disposition within class (*a*), its testamentary character was gathered by the Legislature only from the short period which should intervene between its execution and the death, taken in connexion with its voluntary character; and for that reason it is treated as being within a class which also includes a *donatio mortis causa*.

(1) [1896] A. C. 296. (2) [1895] 2 Q. B. 466.

All dispositions within any of these three classes, varying in their circumstances, have, as I have said, this broad feature in common—they are voluntary, and are *quasi*-substitutes for wills. The disposition here was not for a money consideration; but, not being voluntary, would not have been within this section, even had its subject-matter been personalty; and therefore the property here would not have been liable to account duty under the Act of 1881. Thus, although this property would have escaped the two former duties, it would have so escaped them for different reasons. It would have escaped succession duty because the property passed before the death; and would have escaped account duty, even had it been extended to realty, because the settlement, although not in consideration of money or money's worth, was still for valuable consideration.

I now come to the Act of 1889, which, by its 11th section, extended each of the three classes of property mentioned in sect. 38 of the Act of 1881.

The first extension is that the period of "three months" in sect. 38 is to be read as twelve months. Notwithstanding this prolongation of the period within which they are executed, the character of substitutes for wills acquired by the Act of 1881, in the view of the Legislature, continues to attach to them.

Next, words are introduced which possibly might have been more aptly brought into class (*c*). They extend class (*a*) to dispositions of property under gifts *whenever made*, of which *bona fide* possession and enjoyment should not have been assumed "by the donee immediately upon the gift, and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise."

The effect of this extension is to treat as nullities (for the purpose of exemption from duty) dispositions which are not accompanied by possession and enjoyment according to their terms, and to attribute to a benefit, either reserved to, or acquired by contract by, the donor, the same effect as in class (*c*) is given to the reservation of a life estate.

The extension of class (*b*) is unnecessary to be referred to here; and that of class (*c*) is, *inter alia*, to extend the expression "volun-

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tary settlement" in the description of property within it, to trusts in favour of volunteers contained in settlements which, as between others, are for value.

This statute, which, *inter alia*, gave legislative effect to a construction of the Act of 1881 which had been previously adopted in *Crossman* v. *The Queen* (1), more clearly rendered subject to the duties property derived through that which, either in substance was a voluntary transaction, or which was executed by reason of an element of bounty, although it might be technically regarded as one for value.

Taking, however, the two Acts of 1881 and 1889 together, one essential element to subject property to account duty was that those who were entitled to it after the death should have acquired it through a disposition which, in truth and reality, was voluntary, a description which settlements in consideration of marriage did not answer.

Now, the Act of 1894 having, in the first instance, imposed the new tax upon property which included all that was theretofore liable to either of the two duties I have mentioned, next proceeds, as did the Succession Duty Act, to deal with exemptions from the tax. The section of which this is the function is the 3rd, which I conceive to be the determining one in this case.

I have already called attention to a conveyance in consideration of marriage being insufficient to exempt the property comprised in it from succession duty, and that such a conveyance did not *necessarily* bring into the settlor's estate an equivalent in property. A construction, however, had been put upon that section in *Floyer* v. *Bankes* (2) and *The Attorney-General* v. *Rathdonnell* (3), under which a conveyance in consideration not only of marriage but also of money, would not be exempt from that duty even to the value of the money consideration, so that both the money which was part of the consideration (if it continued to be the property of the settlor at his death) and the property which was aliened for that consideration were taxed.

(1) 18 Q. B. D. 256.
(2) 3 De G. J. & S. 306; 9 Jur. (N. S.) 1255; 12 W. R. 28.
(3) 32 L. R. Ir. 574.

The first matter effected by this sect. 3 was the abrogation of this anomaly: *Lombard's Trusts* (1). It applied the exemption not only when the property was acquired for full consideration in money or money's worth, but also, to a proportionate extent, where part of the consideration was of that character. But, further, it was required that, to be within the new exemption, the money should be "paid to the vendor or grantor for his own use or benefit," thus giving effect more plainly to the principle that the ground of the exemption was that the disposition did no more than substitute one item of property for another, leaving taxable the consideration which had been brought in as an equivalent for that which, by having been disposed of, had escaped taxation. Then the exemption thus modified is made to extend to all classes of property upon which estate duty would otherwise have been payable.

Accordingly, sect. 3 modified the exemption granted by sections 7 and 17 of the Succession Duty Act. It exempted from the full amount of the tax any property which passed on the death by reason only of a *bona fide* purchase, such exemption being complete, if the full consideration was, in money or money's worth, paid to the deceased for his own use and benefit, and partial, where portion only of the consideration was of that character.

This exemption applied, *inter alia*, to property which was brought under taxation by sect. 2 (*c*), the first part of the description in which is "property which would be required on the death of the deceased to be included in an account under sect. 38 of the Act of 1881, as amended by sect. 11 of the Act of 1889."

If, however, the description had stopped there, the exemption provided in section 3 would, as to this class of property, have been unnecessary, because to be within the description of the taxable property, it should have been derived through a voluntary disposition, and to exempt it because it was not derived through such an instrument would be unnecessary and illogical. So, to make sense of the statute as a whole, some modification of section 38, as it stood amended by the Act of 1889, was necessary before it could be aptly brought into that of 1894; and, therefore, when we know

(1) [1904] 2 I. R. 621.

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that section 38 is to be brought into, and form an operative part of, the new enactment, we expect to find some modification of it to make it fit in with this section 3.

Now, can we gather from sections 1, 2, 3, and 4 any idea of what that modification should be? We know, from sections 1 and 2, that there are, *inter alia*, three classes of property subjected to the new tax—(1) property theretofore subject to succession duty, to gain exemption from which it should have been derived through a *bona fide* disposition for money or money's worth; (2) personal property theretofore subject to account duty, which escaped if it were derived through a disposition which was not voluntary, whether the valuable consideration was either money, money's worth, or marriage; (3) property which theretofore had not been subject to either of these duties—viz. real property, which had been disposed of by a voluntary deed having immediate operation *inter vivos*, and executed *within* twelve months before death.

We further know, from section 3, that each of these three classes of property is to have the element of one common exemption, dependent upon its being derived through a purchase for money or money's worth; and from section 4, that all property subject to the tax should, for the purpose of ascertaining the rate of duty, be aggregated together. Surely the modification necessary in the description of property theretofore subject to account duty, to make it fit in with the other legislation, would be to alter the character of the dispositions which prevented the operation of section 3 on the property within them. Such modification, had the Legislature desired that the property taxable under this head should be identical with that theretofore liable to account duty, might have been that for "voluntary" should be substituted, "not being in consideration of marriage"; but had this been the enactment, there would have been exemptions from taxation, of one nature in respect of property within one class, and of another nature in respect of property within another class, each exemption being grounded on the character of the disposition through which the property was derived, and there being no apparent reason why the exemptions should be different.

On the other hand, if the Legislature desired the exemption to be uniform, and that full effect should be given to section 4, by dealing with, as one common mass, all the property to be made subject to the new taxation, the apt modification would have been to strip the description of the dispositions within the old legislation of its voluntary character. The intention to do this is apparent in the words of sect. 2 (*c*); the modification directed being that the new enactment is to be as if "voluntary" and "voluntarily," and a reference to "volunteer," were omitted from sect. 38. I gather from what I have said that the intention of the omission of "voluntary" was that that section, as amended, should extend to property taken under dispositions not necessarily voluntary, or, in other words, to dispositions either voluntary or for value.

The defendants, however, say that, however this may be, whatever may have been the intention of the Legislature, they have failed to give effect to it, for they have left standing in the section the words "purporting to operate as an immediate *gift* inter vivos," and that these words restrain the description as effectually as it was restricted when the words were in conjunction with "voluntary"; that, however clear may be the intention, there is an absence of operative words imposing new taxation in the case in hand: *voluit, sed non dixit.*

This renders it necessary to consider the meaning, in sect. 38, as amended by section 11 of the Act of 1889, of the words "voluntary disposition . . . purporting to operate as an immediate gift inter vivos."

The meaning of "voluntary disposition" is definitively and conclusively settled by the decision of the Court of Appeal in England, in *The Attorney-General* v. *Jacobs Smith* (1), in which it was held that "voluntary disposition" in this section did not mean the instrument in which the disposition was contained, but the disposition itself, and that it therefore included a disposition which (although contained in a settlement which, as between other parties, was for valuable consideration), was in favour of a person who was not within the consideration of the settlement.

This decision involves this, that "voluntary disposition"

(1) [1895] 2 Q. B. 341.

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means a disposition which operates by way of gift. But the words "purporting to operate by way of immediate gift inter vivos," refer to the operation of this same disposition. The first words define a certain class or "*genus*" of disposition: the second a particular sub-class or "*species*" within that class or "*genus*." To be within that "*species*," the disposition must not only be a "disposition which operates by way of gift," which is the element common to the entire "genus," but it must purport to "operate by way of *immediate* gift inter vivos." The specific difference, the *differentia*, the new element introduced by the latter words into the character of the disposition, is not that of bounty. It has been stamped with that character by the previous words. The new element is one of time; the disposition must be one purporting to operate immediately, and to be an act inter vivos, and not by will. Thus read, their true meaning is, "a disposition which being voluntary operates by way of gift, and which purports to so operate immediately inter vivos"; or, in other words, a voluntary settlement purporting to operate immediately inter vivos. The words "gift inter vivos" are referential to voluntary disposition. They describe the legal operation and effect of a disposition, already described as voluntary, and qualify the character of that voluntary disposition, by requiring that it shall purport to take effect immediately inter vivos. The referential character of the words of "bounty" to each other also appears from the words introduced into class (*a*) by the Act of 1889. They do not contain the words "voluntary disposition," which are some of the governing words of the description of this class in the first Act. Into that description is rightly brought "any gift," not "any gift under a voluntary disposition." As, in the Act of 1881, effect is given to the voluntary character of the disposition by its operation being described as being by way of "gift," so "gift," in the Act of 1889, aptly and sufficiently describes the voluntary disposition by which it is effectuated.

Referring back to the general words of the description, it will be found that it contains four, and only four, words indicative of bounty. Taking them in the order of time they are—(1) voluntary; (2) gift; (3) donee; (4) donor. The two latter aptly describe the persons to whom and from whom the property

moves under the gift, and do no more than reiterate the character they acquire from the nature of the disposition or gift. They add no additional force to it, and are referable to it. "Gift," as I have already shown, is referable to the character the disposition had already acquired from being voluntary. Thus, the word "voluntary" permeates the entire description. It is by reason of that that the disposition is described as a "gift" and that the parties to it are designated as "donor" and "donee." When that element is extinguished, those things which, by reason of it, acquired particular designations, cease to answer those descriptions. The disposition itself ceases to be a "gift," and must be read "disposition." The parties to it no longer answer the descriptions of donor and donee; they become "grantor" and "grantee."

As to the word "gift" being allowed to remain in the description, it may be remarked that "give" is not inappropriate, at common law, to a grant for value of an estate; nor is "gift" an untechnical word of reference to that which has been effected by way of such a grant (Shep. Touchstone, 227). The moment the element of voluntariness is excluded, the words of the description are quite sufficient to embrace the property in question here.

As to the effect of the repeal of part of an Act upon the portion remaining unrepealed, I shall refer to but one authority—that of the Court of Appeal in England in *The Attorney-General* v. *Lamplough* (1). The question there arose upon the statute 52 Geo. 3, c. 150, which imposed a stamp duty on the articles mentioned in a schedule which included, *inter alia*, certain artificial mineral waters which were particularly described under a videlicet. There was a general clause at the end of the schedule: "All *other* waters to be used as medicines made by any person, and by public advertisement held out to the public by the vendor as beneficial to the prevention, cure, &c., of disorders affecting the human body." A subsequent statute, 3 & 4 Wm. 4, c. 97, s. 20, repealed so much of the schedule as was contained in the words commencing "waters, viz." A composition was sold which answered the repealed description of "waters," and which was used

(1) 3 Ex. D. 214.

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as a medicine, and was advertised as such by the vendor. The question was whether it was liable to the stamp duty. The Solicitor-General there contended, as do the counsel for the defendants here, that the description should be read as if the words repealed had never been inserted, and that thus reading it, the composition would clearly be within the general clause at the end of the schedule. A majority of the Exchequer Division (Kelly, C.B., dissenting) held the composition taxable upon the ground that the principle that when a statute has been repealed it must be considered (except as to transactions past and closed) as if it had never existed, applied to the repeal of part of a statute. On appeal this decision was reversed. Lord Bramwell said (p. 227):—

> "Then it is argued that you cannot look at the repealed portion of the Act of Parliament to see what is the meaning of what remains of the Act . . . I, however, dissent from it. If it were an accurate opinion, this consequence would follow, that an Act of Parliament which at one time had one meaning would by the repeal of some one clause in it have some other meaning."

Brett, L.J., said (p. 231):—

> "The judgments of the majority in the Exchequer Division lay down that the moment an Act of Parliament is partly repealed we cannot look at the repealed part for any purpose, but that the repealed part must be regarded as if it had never been enacted. I cannot help thinking that that part of the judgments is not sustainable, for what we have to consider is, not what was the construction of the first statute, but what is the effect of the repealing statute. We cannot tell what is the effect of the latter without looking at the meaning of the statute which it has repealed. We must treat it as we treat all statutes for the purpose of construing them; we must look at the facts which were existing at the time the Act passed to see what was its meaning."

A few words in the judgment of Cotton, L.J. (p. 234), are to the same effect:—

> "The effect of this is that the portion of the schedule so repealed is no longer operative for the purpose of imposing any tax. But for the purpose of construing words of reference—that is, for the purpose of seeing what, as a matter of construction, is meant by the words in the tail of the schedule, 'all other waters,' &c., I am of opinion that we must look at what goes before, though no longer operative."

These words were used in reference to a mere repeal of some of the words of a statute. They apply, *a multo fortiori*, to the statute here, which, so far from being such a mere repeal, takes the altered words and carries them into a new statute, having a new object, and places them there in a new context.

To all this I have to add that the only construction with which that which I have adopted is in competition, is one which, as I have already observed, denies any force or operation to the specific enactment directing the omission of "voluntary" in the description of the class in question.

Upon the whole case I have arrived at the clear conclusion that the property comprised in the settlement is liable to estate duty, therefore to settlement estate duty, and that consequently our judgment should be for the Crown. The case, however, is not, in my opinion, one for costs.

JOHNSON and GIBSON, JJ., concurred.

Solicitor for the informant: *The Solicitor for Inland Revenue.*
Solicitor for the defendants: *Edward S. Maffett.*

J. G. T.

K. B. Div. 1905. Feb. 13.

THE KING (CULBERT) *v.* D. M. STEEN, Revising Barrister appointed by THE BELFAST HARBOUR COMMISSIONERS to revise the List of HARBOUR ELECTORS (1).

Belfast Harbour Commissioners—Election—Qualification of electors—Rated occupier—Net annual value of not less than £20—Aggregation of ratings of separate premises—Belfast Harbour Act, 1883 (46 & 47 *Vict. c.* lix.), *sect.* 8.

One of the qualifications required by section 8 of the Belfast Harbour Act, 1883, to entitle a person to have his name placed on the register of electors and to vote at the election of Belfast Harbour Commissioners is that such person should be rated as occupier of premises within the borough of Belfast on a net annual poor law valuation of not less than £20.

C. was rated as occupier of certain premises within the borough of Belfast on a net annual valuation of £19, and as occupier of certain other premises in that borough on a net annual valuation of £6 10*s.*:—

Held, that he came within the qualification.

Mandamus.

This was an application on behalf of the prosecutor to make absolute a conditional order, dated the 9th February, 1905, ordering that a mandamus should issue, directed to the Revising Barrister appointed by the Belfast Harbour Commissioners, commanding him to proceed to hear and determine the claim of the prosecutor to have his name inserted on the register of electors qualified to vote at an election of the Commissioners to be holden during the year 1905, and ordering that the said Revising Barrister in the meantime be restrained from signing the said register.

The prosecutor was in occupation of premises situate at 57, Sandy Row, in the city and county borough of Belfast, as occupier of which he was rated on a net annual value according to the Poor Law Valuation of £19 per annum; and was also in occupation of premises situate at 19, Glenalpine Street, in the city and county

(1) Before Lord O'Brien, L.C.J., and Madden and Boyd, JJ.

borough of Belfast, as occupier of which he was rated on a net annual value of £6 10*s*. The prosecutor resided on the premises at Sandy Row, which were within twenty miles of the offices of the Belfast Harbour Commissioners, and was so residing on the 1st November, 1904.

A list was published by the Belfast Harbour Commissioners of the persons entitled to vote at the election of Commissioners for the year 1905, in which list the prosecutor's name did not appear. A claim was made on behalf of the prosecutor to have his name placed on the list, and his name was printed and published by the Belfast Harbour Commissioners in the supplemental list of persons claiming to be entitled to vote at the election of Commissioners in the year 1905. The Secretary of the Commissioners objected to the prosecutor's name being inserted in the supplemental list. The claim came on for hearing before the Revising Barrister on the 8th February, 1905, when evidence was given as to the residence of the prosecutor and his occupation of the premises, and their net annual value as stated above. The Revising Barrister stated that he would sustain the objection to the claim on the ground that the provisions of the Belfast Harbour Act, 1883, did not warrant the amalgamation of several ratings, each under £20, for the purpose of producing a rating of £20, or upwards. An application was made to the Revising Barrister, on behalf of the prosecutor, for adjournment of the final decision of the claim until the 15th February, 1905, and was granted.

William Moore, K.C., and *T. H. Gibson*, for the prosecutor, referred to the Belfast Harbour Act, 1883 (46 & 47 Vict. c. lix., s. 8); *Nolan's Case* (1); *Huckle* v. *Piper* (2).

James Andrews, for the Belfast Harbour Commissioners:—

The position taken up by the Belfast Harbour Commissioners is shown by a resolution passed by them on being served with the conditional order, which resolution is to the following effect:—"That under the circumstances the solicitor be instructed to arrange for junior counsel to attend out of respect to the Court the

(1) 4 Ir. C. L. R. 290. (2) L. R. 7 C. P. 193.

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hearing of the mandamus proceedings in the case of the claim of John Culbert above referred to, and to inform the Court that the Commissioners do not propose to argue the case nor to interfere in the matter beyond stating that the list of persons entitled to vote at the election of Commissioners in the year 1905 was prepared in accordance with the Revising Barrister's decision of last year, and that the Commissioners desire that the names of all persons duly qualified in the terms of the Act should appear on the register of electors."

LORD O'BRIEN, L.C.J.:—

We are all of opinion that the view taken by the Revising Barrister of the section in question (section 8 of the Belfast Harbour Act, 1883) was erroneous. The qualification required by the section is that the person shall "be rated as the occupier of premises within the borough of Belfast on a net annual value according to the Government Valuation for the time being in force for the purposes of the relief of the destitute poor of Ireland of not less than £20." The prosecutor here precisely answers that description. He is the occupier of premises rated at not less than £20. The word "premises," in our judgment, is not confined to one set of premises, but includes several sets, making up an aggregate valuation of £20. I think that this is clear on the language of the section without referring to the cases which have been cited. If the decision of the Revising Barrister was right, it would follow that a person who was rated as occupier of premises valued at several hundred pounds would not have a vote unless some one set of these premises was valued at £20, or upwards.

Solicitor for the prosecutor: *Robert Parsons.*

Solicitor for the Belfast Harbour Commissioners: *Edward Bates.*

J. G. T.

THE KING *v.* ANNE MEEHAN (1).

Cr. Cas. Res. 1905. June 23.

Criminal law—Inebriates Act, 1898 (61 & 62 *Vict. c.* 60), *sect.* 1—*Prisoner pleading guilty to primary offence, but not admitting habitual drunkenness—Power to swear jury to try charge of habitual drunkenness—Evidence—Depositions.*

Section 1 of the Inebriates Act, 1898, is not confined to cases where the offender is convicted by a jury of an offence such as mentioned in the section. It applies also where the offender pleads guilty to such offence, and in such case if he does not admit that he is a habitual drunkard a jury may be sworn to inquire as to this:—

So *held*, by the Court for Crown Cases Reserved.

Held, also, by LORD O'BRIEN, L.C.J., and ANDREWS, JOHNSON, GIBSON, MADDEN, BOYD, KENNY, and WRIGHT, JJ. (PALLES, C.B., *diss.*), that in such case the evidence necessary to satisfy the Court that the offence charged was committed under the influence of drink may consist of the depositions taken before the magistrates when the accused was returned for trial.

Held, by PALLES, C.B., that the depositions are not evidence for such purpose, and that the evidence must be given by witnesses duly sworn, examined *vivâ voce* in presence of the prisoner, and liable to cross-examination (2).

CASE RESERVED for the opinion of the Court for Crown Cases Reserved, by His Honour Judge Adams, County Court Judge, and Chairman of Quarter Sessions of County Limerick.

The material statements in the case were as follows:—

"At the Trinity Quarter Sessions for the Division and County of Limerick, 1905, Anne Meehan was indicted (1st count)

(1) Before LORD O'BRIEN, L.C.J., PALLES, C.B., and ANDREWS, JOHNSON, GIBSON, MADDEN, BOYD, KENNY, and WRIGHT, JJ.

(2) Inebriates Act, 1898 (61 & 62 Vict. c. 60):—

Sect. 1 (1). Where a person is convicted on indictment of an offence punishable with imprisonment or penal servitude, if the Court is satisfied from the evidence that the offence was committed under the influence of drink, or that drunkenness was a contributing cause of the offence, and the offender admits that he is, or is found by the jury to be, a habitual drunkard, the Court may, in addition to or in substitution for any other sentence, order

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for a common assault on Patrick M'Carthy; and (2nd count) for being a habitual drunkard within the meaning of sect. 1 of the Inebriates Act, 1898. The Grand Jury found a true bill. The prisoner was arraigned on the said charge of assault, and she pleaded guilty to the said charge of assault. Mr. Leahy, Crown Solicitor, applied to me to swear a jury to try whether the prisoner was a habitual drunkard. I read the depositions, and was satisfied that the said offence of assault was committed under the influence of drink. I asked the prisoner whether she admitted she was a habitual drunkard. She answered, 'No.' I then directed a jury to be sworn. Mr. P. E. O'Donnell, solicitor for the prisoner, objected; arguing that I had no power to swear a jury. I held that I had. A jury was sworn to try the prisoner on the charge of being a habitual drunkard. Evidence was given. The jury found the prisoner was a habitual drunkard. I ordered her to be detained in the State Inebriate Reformatory, at Ennis, for a period of six months."

The point upon which the opinion of the Court was sought was whether the County Court Judge had power or jurisdiction, under the circumstances, to swear a jury to try the issue of habitual drunkenness, or whether he should have refused to have a jury sworn, and dealt with the prisoner under the plea of guilty of common assault.

that he be detained for a term not exceeding three years in any State inebriate reformatory, or in any certified inebriate reformatory the managers of which are willing to receive him.

(2). In any indictment under this section it shall be sufficient, after charging the offence, to state that the offender is a habitual drunkard. In the proceedings on the indictment the offender shall, in the first instance, be arraigned on so much only of the indictment as charges the said offence, and if on arraignment he pleads guilty, or is found guilty by the jury, the jury shall, unless the offender admits that he is a habitual drunkard, be charged to inquire whether he is a habitual drunkard, and in that case it shall not be necessary to swear the jury again.

Provided that, unless evidence that the offender is a habitual drunkard has been given before he is committed for trial, not less than seven days' notice shall be given to the proper officer of the Court by which the offender is to be tried and to the offender that it is intended to charge habitual drunkenness in the indictment.

Charles F. Doyle, for the defendant :—

To come within sub-sect. 1 of sect. 1 of the Inebriates Act, 1898, the person must be "convicted on indictment" of the primary offence. The word "convicted" is one of ambiguous meaning : *Burgess* v. *Boetefeur* (1) ; *Jephson* v. *Barker* (2) ; *The Queen* v. *Blaby* (3). I submit that in this sub-section the word means convicted by the verdict of a jury. The Court must be "satisfied from the evidence" that the offence was committed under the influence of drink, &c. This assumes that some evidence of this is to be given on the hearing of the primary charge ; but if the prisoner pleads guilty to this charge, there can be no such evidence. The depositions do not fulfil the condition. Depositions can never be evidence unless expressly made so by statute. The evidence on which the Judge is to satisfy himself on this point is the evidence on which the person has been convicted, and the depositions are not such evidence. Sub-sect. 2 of sect. 1, no doubt, appears to contemplate a plea of guilty on the primary offence ; but that section deals with procedure only, and gives no power to award punishment. Moreover, the words in that sub-section, "It shall not be necessary to swear the jury again," show, by the use of the definite article and the word "again," that the only jury contemplated was one which had first discharged the duty of convicting on the primary charge. Conflicting views of the effect of the section have been taken by Kenny, J., in *Rex* v. *Crowe* (4), and by Holmes, L.J., in *Rex* v. *Neill* (5).

The Solicitor-General (*Campbell, K.C.*), and *Cecil Atkinson*, for the Crown :—

Sub-sect. 2 expressly provides for the case of an offender pleading guilty to the primary charge. The contention on behalf of the prisoner that the word "convicted" in sub-sect. 1 means convicted by a jury, would lead to the extraordinary result that in no case where the prisoner has pleaded guilty to the primary charge could sentence of detention in an inebriate reformatory be passed, since the argument would apply to a

(1) 7 Man. & Gr. 481.
(2) 3 Times L. R. 40.
(3) [1894] 2 Q. B. 170.
(4) 4 New Ir. Jur. R. 140.
(5) *Ib.* 142.

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case where the prisoner admitted that he was a habitual drunkard, as well as to a case where he denied it. The provision in sub-sect. 1, as to the Court being satisfied from the evidence that the offence was committed under the influence of drink, merely means that the Judge is to determine whether there is evidence upon which the offender can be arraigned on the second charge; and in a case where he has pleaded guilty to the primary charge, we submit that the depositions form such evidence. Possibly, if the Judge was not satisfied with the depositions, he could call witnesses and examine them on the point; but it is not necessary to argue this at present.

The judgment of the majority of the Court (LORD O'BRIEN, L.C.J., and ANDREWS, JOHNSON, GIBSON, MADDEN, BOYD, KENNY, and WRIGHT, JJ.) was delivered by—

LORD O'BRIEN, L.C.J. :—

The question which is presented for our determination in this case may be shortly stated. A woman named Anne Meehan was indicted for assault, and the indictment also charged that she was a habitual drunkard. On arraignment for the assault, she pleaded guilty; and being asked whether she admitted she was a habitual drunkard, and she having denied that she was, a jury was impanelled, and she was tried and found guilty, and ordered to be detained in the Ennis Inebriate Reformatory for six months. The question in this case is whether the learned County Court Judge was right in impanelling and swearing a jury to try her on the charge of being a habitual drunkard, she having pleaded guilty to the assault, and not having been convicted of the assault by a jury? That is the question reserved.

I am reasonably clear that the learned County Court Judge was right in what he did, and such is the conclusion of the majority of the Court. But I am very clear indeed that sect. 1 of the Inebriates Act of 1898 is as badly drawn a section as has come under my notice. It consists of two parts: the first part, which provides for punishment; and the second part, which prescribes the procedure to conviction. I take the second part first. [His Lordship read sub-sect. 2 of section 1.]

It is true that no jury had been already sworn to try the prisoner for the assault to which she pleaded guilty on arraignment; but it is I think plain that in the case of a plea of guilty, to what I would designate as the preliminary offence, the expression "the" jury may include "a" jury.

Lord O'Brien, L.C.J.

It seems to me clear that the procedure to conviction as a habitual drunkard in this case was right; but then comes the question, Was the sentence or order of the learned Judge right—was the learned County Court Judge right in ordering the prisoner to be detained in an Inebriate Reformatory? This depends upon the first part of the 1st section—and it is this part of the section causes the difficulty. I shall refer to the language of the clause:—"Where a person is *convicted* on indictment of an offence punishable with imprisonment or penal servitude"—this is the opening part of the section—the word "convicted" is used, and Mr. Doyle, for the accused, contends that as she was not convicted of the assault with which she was charged, but merely pleaded guilty to the commission of it, the section does not apply. However, I think it is reasonably clear that the expression "where a person is convicted" is to be read, may be paraphrased, as "where a person's guilt has been established either by the finding of a jury or the admission of the accused." That the word "convicted" is susceptible of that meaning is established by the case of *The Queen* v. *Blaby* (1), to which Mr. Doyle referred; and certainly the whole scheme and policy and object of the Act would indicate that this was the true construction. The object of the Act was to reform those who, under the influence of drink, committed crime; and the scheme of the Act, the very language of the second part of the 1st section, enables a conviction to be had under the circumstances of the particular case for habitual drunkenness; and if the word "convicted" did not bear the meaning I have ascribed to it, there would be a conviction without punishment—an offence without a sanction. The scheme and object of the Act would *pro tanto* be frustrated. But the section proceeds, "if the Court is satisfied *from the evidence* that the offence was committed under the influence of drink." Now, what is the meaning of the word

(1) [1894] 2 Q. B. 170.

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"evidence"? In a strict sense no evidence was given, because there was no trial; but I think "evidence" means, in the section, testimony in relation to the particular case, and this did exist in the sworn depositions which were before the Court, and which the learned County Court Judge says he read; and on this point also I think the view I take is borne out by the scheme, scope, and object of the Act of Parliament. As to the competency to look at the depositions, all the members of the Court, save the Lord Chief Baron, concur.

The only words in the first clause of the first section that present any difficulty are the words "conviction" and "evidence"; and for the reasons I have assigned, I think they bear the meaning I have ascribed to them. We accordingly think the learned County Court Judge was right in the course he adopted.

PALLES, C.B.:—

Upon the principal question I agree with the other Judges. In my opinion, an accused person may be ordered to be detained in a State Inebriate Reformatory, or in a certified inebriate reformatory, although he has pleaded guilty. Sect. 1, sub-sect. 2, is express: "And if on arraignment he pleads guilty . . . *the jury shall, unless the offender admits that he is a habitual drunkard, be charged to inquire whether he is a habitual drunkard.*" The subject-matter of the previous sub-section consists of matter, in part prior to, and in part subsequent to, the impanelling of the jury; and this latter part is so mixed up with the subject-matter of sub-sect. 2, by prescribing, as it does in sub-sect. 1, the consequence of action under sub-sect. 2, that, in the absence of a coercive context to the contrary, both sections must be held to be co-extensive. There is no such coercive context; therefore sub-sect. 1 must include, as sub-sect. 2 admittedly does, the case of a prisoner pleading guilty. Were we to hold otherwise, we would deny *any* effect to the provision I have quoted from sub-sect. 2.

It is said that we must arrive at the opposite conclusion, in consequence of the use of the words "convicted" and "evidence" in the previous sub-section, coupled with the description of the jury who are to try the issue of habitual drunkenness as "*the*"

jury, not "*a*" jury. These words are said to show that sub-sect. 1 excludes the case of a prisoner who pleads guilty. The cases cited as to the meaning of "convicted" do not assist. Here the word is applied to a person who has not been sentenced although his guilt has been ascertained, and that ascertainment can be by plea of guilty, as well as by verdict: *The Queeen* v. *Blaby* (1).

As to the word "evidence," a trial under this Act involves three distinct inquiries, and three distinct determinations:

(1) Whether the prisoner is guilty of the indictable offence charged. Unless the prisoner pleads guilty, this must be determined by the jury in the usual way.

(2) Whether the offence was committed under the influence of drink, or that drunkenness was a contributing cause of the offence. This is to be determined by the Judge, not by the jury.

(3) Whether the prisoner is a habitual drunkard. This, in the absence of an admission by the prisoner, must be determined by the jury.

These three matters must be determined in the order above stated, because the statute contemplates that, before the second inquiry is entered on, it shall have been determined that an offence has been committed; and it is only if the Court is satisfied that it was so committed under the influence of drink, or that drink was a contributing cause, that there is jurisdiction to enter on inquiry No. 3. Until the last of them has been concluded, the sentence authorised by the Act cannot be imposed, and, consequently, until then the trial continues.

In the present case the prisoner pleaded guilty to the indictable offence; and, therefore, when it became the duty of the Judge to determine the second matter, no evidence had been given, or could legally have been given.

But there was a duty on the Judge to determine it on *evidence*. What, then, should have been done? I am of opinion that the evidence, bearing on the matter to be determined by the Judge, should have been given in the mode approved by the common law, viz., by witnesses who were duly sworn or affirmed,

(1) [1894] 2 Q. B. 170.

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examined *vivâ voce*, in the presence of the prisoner, and liable to cross-examination on her behalf. I am unable to agree with my learned brethren that the depositions were evidence against the prisoner. I hold that it would have required a clear intention upon the face of the statute to make that evidence against her, which, before the statute, was not evidence; and I cannot see how it is material that the evidence is to be upon an issue which is to be determined by the Judge, and not by the jury. To my mind the statute does not manifest this intention. The word "evidence" in the proviso at the end of the section refers, in the past tense, to that which, at the time referred to, was strictly evidence against the prisoner—evidence given before the Justices; but the statute nowhere says that the evidence given against the prisoner before the Justices shall be (that which in this case it would not have been) evidence against her at the trial.

As to the use of the definite article "*the*" before "jury," its use, where it first occurs in sect. 1, sub-s. 2, is quite appropriate; and where secondly used it occurs in a clause which assigns to the jury, as distinguished from the Judge or the Court, the province of determining a particular issue, viz., that of habitual drunkenness. In such a clause the definite article may be used; but even if it might not, I would not for that reason alone adopt a construction against the paramount intention of the Act, evidenced by its express application to a prisoner who pleads guilty.

Solicitor for the Crown: *Sir Patrick Coll.*
Solicitor for the defendant: *P. E. O'Donnell.*

J. G. T.

GUARDIANS OF THE POOR OF THE UNION OF BALLYCASTLE *v.* M'CAUGHAN (1).

K. B. Div. 1905. Feb. 14

Poor law—Destitute poor blind child—Maintenance by Guardians in institution for blind—Liability of parent—1 & 2 *Vict. c.* 56, *ss.* 53, 54—6 & 7 *Vict. c.* 92, *s.* 14.

A blind boy, eleven years of age, was, with the consent of his father, sent by the Guardians of a union, as a destitute poor blind child, to an approved institution for the blind, and maintained there for three years, the expenses of such maintenance being paid by the Guardians out of the rates, under the provisions of sect. 14 of 6 & 7 Vict. c. 92:—

Held, that the sums so expended were recoverable by the Guardians from the father.

CASE STATED by Johnson, J., upon the hearing of a civil bill appeal at the Summer Assizes, 1904, for the county of Antrim.

The following are the material facts as set out in the case:—

The appeal was brought from a dismiss on the merits by the acting County Court Judge at the Ballymoney Quarter Sessions to recover the sum of £42 5*s.*, for money expended by the plaintiffs in the maintenance of James M'Caughan, junior, the son of the defendant, for which the defendant was alleged to be liable by virtue of the Irish Poor Relief Act, 1838, and the Poor Relief (Amendment) Act, 1843, and for money paid, laid out, and expended by the plaintiffs for the son of the defendant at his request, and for money lent by plaintiffs to defendant and due upon accounts stated.

The defendant's son was blind. He was born on the 26th April, 1889. The plaintiffs passed a resolution on the 8th December, 1900, that he should be sent to St. Joseph's Male Blind Asylum, Drumcondra, Dublin, at a cost of £15 per year. The resolution was moved by the district councillor of the electoral division in which the defendant resided, at the instance and on the

(1) Before LORD O'BRIEN, L.C.J., and MADDEN and BOYD, JJ.

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request of the defendant. At the date of the resolution the defendant was possessed of three farms of land, containing, respectively, 41A. 20P., 25A., and 11A., held by him under tenancies from year to year, at the annual statutory rents of £11 5s. 6d., £10 1s., and £5 10s., respectively. The defendant's son was sent to the said blind asylum in pursuance of the said resolution, and was maintained therein from the 8th December, 1900. The sum charged to the Guardians for the maintenance of the defendant's son in the asylum amounted to the sum of £15 per annum, and this sum was paid by the plaintiffs to the authorities of the asylum for three years up to the 10th November, 1903, by quarterly instalments of £3 15s. out of the poor rate, No application was ever made by the plaintiffs to the defendant for the reimbursement of the same until the 12th November, 1903.

Before the year 1904 the defendant received a sum of £500 under an American will, which sum he stated he applied in the discharge of mortgages upon the said three farms of land and some other debts. After the receipt of the said sum, the defendant, in response to a claim made by a letter from the clerk of the plaintiffs, dated 12th November, 1903, paid to the plaintiffs the sum of £3 15s. in respect of one quarterly instalment then accrued due for maintenance in the asylum of the defendant's son. The defendant was examined at the hearing of the appeal, and stated that he was the owner of thirteen shares in the Ulster Bank, Limited, and that his children would be entitled to some money in their own right when attaining age. By letter, dated the 30th December, 1903, the plaintiffs applied to the defendant for payment of the sum of £38 10s., being the balance alleged to be due by the defendant in respect of the past maintenance of his son in the asylum, and by letter, dated the 1st January, 1904, the defendant replied, "I did get some money out of America at my aunt's decease, but I am sorry to say it was all sunk in debt before it came. I have three farms on the side of a mountain, and seven of a family to support out of the proceeds of them, besides a simple sister, so I think I am fairly well loaded. I see nothing for me but to take my son James home, and let him stagger about among the rest." The plaintiffs thereupon issued the civil bill to recover from the defendant the sum of £42 5s., being the sum of

£38 10s. referred to in the letter of the 30th December, 1903, and the sum of £3 15s., a quarter's maintenance subsequently accrued. The civil bill was dismissed on the merits by the acting County Court Judge.

The question reserved by Johnson, J., for the Court was—Whether the plaintiffs were entitled to recover from the defendant all, or any, and what part, of the sum sued for?

Megaw (with him *Bates, K.C.*), for the plaintiffs:—

The defendant's son was under fifteen years of age when the moneys sued for were expended by the plaintiffs. By section 53 of 1 & 2 Vict. c. 56, a father is liable to maintain his child until such child attains the age of 15, and by section 54 relief given under the Act to a child is to be considered as given to the person liable to maintain the child. Moneys paid by the guardians for the maintenance of a pauper are recoverable from the person liable for such maintenance: *Guardians of Trim Union* v. *Tyrrell* (1); *Governors of Monaghan Lunatic Asylum* v. *Connolly* (2); *In re Watson* (3); *In re Clabbon* (4). Under 1 & 2 Vict. c. 56 there was no provision for maintenance outside the workhouse, but section 14 of 6 & 7 Vict. c. 92 empowered the guardians to send a destitute poor deaf and dumb or blind child under 18 to an institution for the maintenance of the deaf and dumb or blind, with the consent of the parents or guardians, and to pay the expense of such maintenance out of the rates raised under 1 & 2 Vict. c. 56. The Act 6 & 7 Vict. c. 92 is expressly declared to be an Act for the further amendment of 1 & 2 Vict. c. 56, and section 28 provides that the two Acts are to be construed as one Act. We submit, therefore, that maintenance in such an institution is merely an alternative form of relief to maintenance in the workhouse, and is subject to the same legal incidents as relief given under 1 & 2 Vict. c. 56.

M'Cutcheon, for the defendant:—

The maintenance of a child in an institution provided for by

(1) 3 New Ir. Jur. 173.
(2) 27 L. R. Ir. 303.
(3) [1899] 1 Ch. 72.
(4) [1904] 2 Ch. 465.

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section 14 of 6 & 7 Vict. c. 92 is quite different in its nature from the relief given under 1 & 2 Vict. c. 56. The age-limit is different; the consent of the parent or guardian is made necessary to sending the child to the institution; and the maintenance and education in such institution are of a much more expensive character than in the workhouse. When 10 Vict. c. 31 was passed, enabling out-door relief to be given, it was thought necessary, although such relief was much more analogous to the relief under 1 & 2 Vict. c. 56 than is the maintenance in the present case, o provide expressly, by section 8, that all relief given under that Act, 10 Vict. c. 31, should be considered as given to the person declared by that Act liable to maintain his wife or child. The absence of any such provision from 6 & 7 Vict. c. 92 shows that it was not intended that liability should attach to the parent for the expense of maintenance provided by the guardians under section 14. *Guardians of Trim Union* v. *Tyrrell* (1) was merely a decision on a civil bill appeal, and is not binding on this Court. In any event, it deals only with liability under 1 & 2 Vict. c. 56. The other cases cited were decided upon special statutes applying to lunatics and minors, and do not touch the present case.

Bates, K.C., in reply:—

The provision in section 8, of 10 Vict. c. 31, was superfluous and merely expressed, *ex abundanti cautelâ*, what would have been the law even in the absence of such enactment. The only inference which can be drawn from superfluous provisions of this kind is that the Legislature was either ignorant or unmindful of the real state of the law, or that it acted under the influence of excessive caution: Maxwell on Statutes, 3rd ed., pp. 437, 438.

LORD O'BRIEN, L.C.J.:—

This case has been very well argued. The question is whether the plaintiffs, the Guardians of the Ballycastle Union, are entitled to recover a sum of £42 5*s.* from the defendant, James M'Caughan,

(1) 3 New Ir. Jur. 173.

being money expended by the plaintiffs in the maintenance of the defendant's son, a boy under fifteen years of age. The boy, who was blind, was taken into the poorhouse as a destitute child, and was afterwards, in pursuance of a resolution of the guardians, sent to St. Joseph's Male Blind Asylum, Drumcondra, Dublin, where he was kept and maintained according to the regulations of that institution. It is not denied that the defendant would have been liable under sections 53 and 54 of 1 & 2 Vict. c. 56 for the maintenance of the boy if he had remained in the Union. But it is said that he is not responsible under section 14 of 6 & 7 Vict. c. 92 for the maintenance of the boy in the Blind Asylum; and it is pointed out that this Act contains no provision similar to sect. 54 of 1 & 2 Vict. c. 56, which enacts that all relief given under that Act to a wife or child shall be considered as given to the person declared to be liable by the Act to maintain such wife or child. But the 28th section of 6 & 7 Vict. c. 92 provides that that Act and the 1 & 2 Vict. c. 56 shall be construed as one Act, and in this composite and constructively single Act we have the 54th section of 1 & 2 Vict. c. 56. Moreover, the 6 & 7 Vict. c. 92 is an Act passed to amend the 1 & 2 Vict. c. 56, so that, even independently of section 28 of the first-mentioned Act, I think the two Acts must be read as one. I am of opinion, therefore, that the guardians are entitled to recover the amount claimed from the defendant.

Mr. M'Cutcheon, in his very excellent and clear argument, pointed out that section 8 of 10 Vict. c. 31 expressly enacts that relief given to a wife or child under that Act is to be considered as given to the person liable to maintain such wife or child, and that there is no similar provision in 6 & 7 Vict. c. 92. I do not think, however, that this section in the subsequent Act can control the operation of the 6 & 7 Vict. c. 92. I think that the section was unnecessary, and was inserted *ex abundanti cautelâ*. I think the inference a Court can draw from superfluous provisions in a statute is well expressed in the passage from Maxwell on Statutes (3rd ed., pp. 437, 438) referred to by Mr. Bates, that is to say, that the Legislature was either ignorant or unmindful of the real state of the law, or that it acted under the influence of excessive caution.

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On the above grounds, we think that the plaintiffs are entitled to recover the sum claimed.

MADDEN and BOYD, JJ., concurred.

Solicitors for the plaintiffs: *P. and J. Boyle.*
Solicitor for the defendant: *J. K. Currie.*

J. G. T.

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May 1, 2, 5, 12, 18.

O'CARROLL, APPELLANT; HASTINGS, RESPONDENT (1).

Local government—Urban district council—Disqualification—Member acting when concerned in contract with council—Contract completed on part of member at time of acting—Disqualification for election—Continuance of such disqualification notwithstanding subsequent completion of contract—Schedule to Local Government (Application of Enactments) Order, 1898, *art.* 12.

On the 7th November, 1904, H. obtained a contract from an urban district council for printing to be done in connexion with the forthcoming election of members of the council. The election took place on the 16th January, 1905, and H. was elected a member. At the date of his election H. had completed the contract on his part, with the exception of the printing of the notice of the result of the election, but had not received payment of the contract price. On the 18th January H. printed the notice of the result of the election, thus completing the contract on his part. On the 23rd January H. attended a meeting of the council, signed the declaration of acceptance of office, and acted in the proceedings. Before leaving he was paid the amount of his contract:—

Held, that H. had acted as a member of the council when disqualified, and was liable to the penalty imposed by art. 12 (11) of the Schedule to the Local Government (Application of Enactments) Order, 1898.

Royse v. *Birley* (L. R. 4 C. P. 296) and *Connolly* v. *Fitzgerald* (unreported) distinguished.

Cox v. *Truscott* (21 Times L. R. 319) considered.

CASE STATED under 20 & 21 Vict. c. 43.

At a Petty Sessions held for the Petty Sessions District of Ballinasloe, in the county of Galway, the respondent was charged on summons, on the complaint of the appellant, for that he did, on

(1) Before LORD O'BRIEN, L.C.J., and ANDREWS and GIBSON, JJ.

the 23rd January, 1905, act as a member of the Council of the Ballinasloe Urban District at a meeting of the said Urban District Council of Ballinasloe, on the said 23rd day of January, 1905, he being then and there disqualified to act as such councillor by reason of being concerned in a contract with the said urban district council for printing, and thereby disqualified from being elected or being a member of the said urban district council, or acting as such member, contrary to the provisions of the Local Government (Application of Enactments) Order, 1898. The magistrates dismissed the summons on the merits, but, on the application of the complainant in the summons, stated the present case, from which the following extracts are taken :—

"At the hearing of the said complaint it was proved, on the part of the complainant, that on or about the 7th November, 1904, the defendant obtained a contract from the Ballinasloe Urban Council for printing to be done in connexion with the urban council elections to take place in January, 1905. The defendant contracted to do that work for £12. In pursuance of that contract the defendant did all the printing and advertising in connexion with the elections. The election of urban councillors took place on the 16th January, 1905. The defendant was duly nominated for election and was elected on the Urban Council of Ballinasloe, and his election was declared by the returning officer on the 17th January, 1905. After the declaration of his election the defendant was instructed to print the notice of the result of the elections, and he did so in pursuance of his contract; and this, the last item of his contract, was completed on the 18th January, 1905. The new urban council met on the 23rd January, 1905, and the defendant was present and signed the declaration accepting office, and took part in the proceedings of the council. Before he left the board-room of the council he was paid in cash by the clerk of the council the amount of his contract for election printing, £12.

"And whereas, upon the said hearing we being of opinion that the defendant was not a contractor on the 23rd day of January, 1905, when he attended a meeting of the urban council, and not disqualified from acting as a member of the council, dismissed the case against the defendant as aforesaid."

The question for the Court was—whether the justices were

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correct, in point of law, in their determination, or as to what should be done in the premises?

Henry MacDermott, for the appellant:—

I contend, first, that on the 23rd January, when the respondent took part in the proceedings of the council, he was concerned in a contract entered into by him with the council. The contract was still existing and incomplete, since the respondent had not been paid the amount of his contract. It was open to the council at that meeting to discuss whether the work had been properly done, and what should be paid to the respondent on foot of the contract. The respondent could have sued on the contract, and, therefore, was clearly "concerned" in it.

Secondly, the respondent was at all events disqualified for being elected on the 16th January. That disqualification was a continuing one, and existed on the 23rd January, when the respondent acted as a member of the council, even though the contract be deemed to have come to an end in the meantime. *Lewis* v. *Carr* (1) is not opposed to this view; in that case the disqualification did not exist at the time of the election, but was incurred subsequently.

George O'Connor, for the respondent:—

As to the first contention, I submit that the respondent was not concerned in the contract on the 23rd January. The work was completed, on his part, on the 18th January, and nothing remained to be done by him but to receive payment. A council cannot, by wrongfully delaying the payment of money due under a contract, keep the person to whom it is due disqualified. There is no evidence that the respondent voted or took part in any discussion in respect of the contract, which is the real mischief aimed at, as is shown by article 36 (6) of the Application of Enactments Order. See also, as to the policy of such enactments, *Nutton* v. *Wilson* (2), *per* Lord Esher, M.R. (p. 747), and *per* Lindley, L.J. (p. 748).

As to the second contention, founded on the respondent having been concerned in the contract at the time of his election, I submit:

(1) 1 Ex. D. 484. (2) 22 Q. B. D. 744.

(*a*) The remedy in such case would be to unseat him on election petition; no such petition was presented, and the respondent having ceased to be concerned in the contract before he acted had purged the disqualification: *Lewis* v. *Carr* (1). (*b*) Assuming, on the other hand, the disqualification to be a continuing one, then the respondent was never a member of the council, and is not subject to the penalties imposed by article 12, sub-sect. 11.

MacDermott, in reply:—

Article 36 (6) does not apply to an urban district council: *Hastings* v. *Beegan* (2).

Cur. adv. vult.

May 5.

LORD O'BRIEN, L.C.J.:—

The facts on which the legal controversy arises in this case are comprised within a very narrow compass, and are succinctly stated in the case. [His Lordship read the case.]

The material dates are:—Contract entered into, 7th November, 1904; election held, 16th January, 1905; election declared, 17th January, 1905; result of election printed, 18th January, 1905. Subsequently, on the 23rd January, the respondent took part in the proceedings of the council before he was paid under the contract, and the question is whether he acted whilst he was still concerned in a contract, and therefore disqualified under article 12, clause 4 (*e*), of the Schedule to the Application of Enactments Order, 1898. The words of that clause, so far as applicable to the present case, are "a person shall be disqualified for being elected or chosen or being a member of a council of a county or of a district . . . if he . . . (*e*) is concerned by himself or his partner in any bargain or contract entered into with the council."

It is alleged by the appellant that the respondent, at the time when he acted by taking part in the proceedings, was concerned in this contract, inasmuch as he had not then been paid.

On the other hand, Mr. O'Connor argues that when the respondent took part in the proceedings the contract was completely performed on his part, and that therefore he was no longer concerned in the contract. In my opinion Mr. O'Connor's contention is not well founded. I may here observe that the magistrates found that

(1) 1 Ex. D. 484. (2) 38 I. L. T. R. 202.

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the respondent was no longer *a contractor*, and therefore dismissed the summons. But the words of the clause are "is concerned" in a contract.

In my opinion, the respondent, at the time when he acted, clearly was concerned in the contract in question, inasmuch as he had not then reaped the fruit of it: he had not been paid the amount due under it. As I observed during the argument of the case, he could have brought an action on the contract to enforce payment; and it would be a strange proposition that a person was not concerned in a contract in respect of which he could bring an action to enforce payment of what was due to him under it. The respondent had not realised the fruits of his contract; and it appears to me that, at the date in question, he was still concerned in the contract. I think, therefore, the magistrates were wrong in dismissing the summons, and that the respondent came within the provision of clause 11 of article 12 of the Schedule to the Application of Enactments Order, 1898, which imposes a penalty on persons acting when disqualified under that Order.

A point was made by Mr. O'Connor, viz. that a petition could have been presented against the respondent, and his election declared void; and that this not having been done, his offence is, as it were, wiped out. But this would be to import a qualification or condition into clause 11 which is not to be found there.

Another argument was founded by Mr. O'Connor on clause 6 of article 36 of the Schedule to the Order. But that article does not apply to an urban district council, as we decided in the case which was referred to, and Mr. O'Connor subsequently abandoned this argument.

On these grounds I think that the magistrates were wrong, and should have convicted the respondent. I may point out, however, that the penalty under clause 11 of article 12 is "a fine not exceeding £20," and this leaves it open to the magistrates to impose £20 or 6*d*., as they may see fit. No costs.

Andrews, J.:—

When the dates and facts in this case are had regard to, it appears to me to be free from difficulty. Upon the 16th of January last (the date of his election) the respondent was

unquestionably concerned in the printing contract in question within the meaning of clause 4 (*e*) of article 12 of the Local Government (Application of Enactments) Order, 1898, as that contract had not then been completed on his part. His election was declared upon the 17th; and upon the 18th he completed the contract, on his part, by printing the result of the elections. The respondent's disqualification, arising from having been so concerned in the printing contract at the time of his election, was never removed, and existed upon the 23rd January, on which day it is found, in the case stated, that he took part in the proceedings of the council, and therefore acted in those proceedings. He acted, therefore, when disqualified, and so became liable, under clause 11 of article 12, to be summarily convicted for that offence.

Even, however, if he had completed the contract on his part at the time of his election, but had not received payment for it, I would be of opinion, although this question was left undecided in the Gloucester election petition case, *Ford* v. *Newth* (1), that he would have been still concerned in the printing contract. He would undoubtedly, while unpaid, have been interested, and materially interested, in that contract, and, therefore, in my opinion, concerned in it. I am unable to limit the generality of the word "concerned" in clause 4 (*e*).

It would appear to me that the attention of the justices was not directed to the precise terms of clause 4 (*e*). The contention of the complainant before the justices was that the defendant was a contractor at the date of his election, and after his election. What the justices, as the case stated shows, determined, was that the defendant was not a contractor on the 23rd January, and thereupon they dismissed the complaint against him.

We must hold that the justices were not correct in point of law in their determination, and that they ought to have convicted. Their order of dismissal must therefore be discharged, and the matter of the complaint must be remitted to them to enter continuances and make an order of conviction accordingly. The amount of the fine to be imposed may, of course, be moderated to any extent which the justices may think right.

(1) [1901] 1 K. B. 683.

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Gibson, J.:—

This case raises an important question. The contract was a small one, but its character brought it plainly within the prohibition. It was for future work, to be paid for at a future time. The Court below, therefore, were wrong in dismissing the case on the ground that the defendant was not a contractor, if they meant that the contract was such that it could not cause disqualification.

The main point argued was whether the contract was performed to such an extent before the defendant acted as member, that he could be said not to be concerned or interested in it. Whether a person who has executed a contract but has not been paid is disqualified, was argued and considered in *Ford* v. *Newth* (1); but the Court decided the case on another ground. Here the contract was not completely executed till the 18th January, and there was no opportunity of passing the account or accepting the contract as performed till the council met on the 23rd. After the defendant took part in the proceedings, he received a cheque for his debt.

Under these circumstances, I am of opinion that he was concerned in the contract, and received the profit of the contract. A person contracting with a council does so for his own profit, and so long as he is not paid his debt, he is concerned and interested in the contract, which continues and cannot be considered to be spent. It may be asked, Could a council, by wrongfully refusing payment, disqualify a person from candidature? The object of the legislation is to preclude all question. Whether a contract has been duly performed or not, is a matter of fact. Suppose a builder completed his contract, but the council disputed this and refused payment, would not the builder be concerned in the contract, even though it turned out afterwards that he was in the right? So long as the money is unpaid, there is a possibility of dispute. If the existence of an unpaid claim under a contract does not disqualify, the contractor could, as member, exert his influence with his colleagues to secure payment or to get a defence to his action withdrawn, and possibly (in case of an urban council) he

1) [1901] 1 K. B. 683.

could even vote on the question, as article 36, sub-sect. 6, is admitted not to apply to this council. The enactment is a salutary one, and should be applied to every case fairly within its operation: see *Todd* v. *Robinson* (1). Cases of hardship may be put; but the enactment is intended to lay down a universal rule, and wherever a person is concerned in, or participates in, the profits of a council contract, he is disqualified.

A second point made below, but faintly put before us, was that if the defendant was disqualified for election, still he could only be unseated on election petition: *Reg.* v. *Morton* (2); and as no such petition was presented, he must be treated as having been duly qualified. This appears opposed to the language of article 12, sub-sect. 4, which relates to being a member as well as to election.

An alternative argument was suggested. If the defendant was disqualified for nomination and election, the election was, it is said, a nullity; he never was a member of the council at all, and he is, therefore, not within the language of the penal clause. It is certain that Mr. Hastings was disqualified for election, as the contract was still, even on his side, open and unperformed; but under article 11, section 6, his acts as member would be valid. Article 12, sub-sect. 4, specifies many disqualifications existing at the time of election, *e.g.* infancy, alienage, criminal conviction. A person must know his own status, and he is taken to be aware of the law. Sub-section 4 disqualifies for being a member, as well as for election. The policy is to prevent disqualified persons from filling the office of member, and acting in such office: *Fletcher* v. *Hudson* (3). Whether the contract is made before or after the election, the mischief is the same: *Hunnings* v. *Williamson* (4). The contractor, though disqualified, can act validly as member; but he cannot escape from the penal consequences by alleging either that he was a mere stranger and not a member at all, or that as he was not removed by election petition, his disqualification is purged. Whether the disqualification precedes election, in which case an election petition could be brought, or whether the disqualification supervenes after election, in which case *quo warranto* would be the remedy, the disqualified person acts at his peril, and cannot

(1) 14 Q. B. D. at p. 746.
(2) [1892] 1 Q. B. 39.
(3) 7 Q. B. D. 611.
(4) 11 Q. B. D. 533.

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get absolution for his conduct from the apathy or unwillingness of the public to undertake the burthen of expensive legal proceedings. Mr. Hastings was *de facto* member, but not *de jure*; and when, being disqualified, he acted, he incurred the penalty.

May 12.

After the above judgments had been delivered, the Court having been referred to the cases of *Royse* v. *Birley* (1) and *Connolly* v. *Fitzgerald* (2), the case was put in the list for further argument.

George O'Connor, for the respondent :—

Royse v. *Birley* (1) and *Connolly* v. *Fitzgerald* (2) clearly show that where a person has completely performed the contract on his part, so that he has nothing to do but to receive the price, he is no longer concerned in the contract.

Henry MacDermott, for the appellant :—

Royse v. *Birley* (1) was a decision on sect. 1 of 22 Geo. 3, c. 45, the terms of which are materially different from article 12 of the Schedule to the Application of Enactments Order. Moreover, as pointed out by Willes, J. (at p. 309), the only relation that existed there between the respondent's firm and the public was the relation of debtor and creditor. Before the election the goods had been supplied, and the Government had accepted them as satisfactory, so that there was nothing to do but to pay the money. This cannot be said to apply here, since it was open to the council to go into the contract and check the items. In *Connolly* v. *Fitzgerald* (2) there had been a reference to arbitration, followed by an award; and if the contractor had had to sue, his action would have been on the award, and not on the contract.

O'Connor, in reply, referred to *Cox* v. *Truscott* (3).

Cur. adv. vult.

(1) L. R. 4 C. P. 296.
(2) Unreported. The facts and decision are given in the judgments, *infra*.
(3) 21 Times L. R. 319.

LORD O'BRIEN, L.C.J. :—

We have already pronounced judgment in this matter; but before our order was made up, we were, through the courtesy of a member of the Bar, referred to a case—indeed to two cases —which were supposed to have a direct bearing on the question at issue, and which were not cited in the argument before us. The question which, in giving judgment, I principally discussed was this—Was the defendant, Mr. Hastings, who, as far as I see, was guilty of no moral delinquency in this case, entitled to say that he was not concerned in a contract though he was not paid the sum he earned by the contract?

I have got a note of my judgment from the official reporter, and perhaps it is better to read it. [His Lordship read his former judgment, as set out *ante*, pp. 593, 594.]

I adhere to every word I said. At the time when, according to the case, Mr. Hastings acted by taking part in the proceedings—not, certainly, in relation to, or in connexion with, his contract; this is not necessary—but at the time he acted, that is to say before he was paid, the contract he had made with the council still existed—it was not merged, abandoned, rescinded, extinguished or satisfied; and if any demur was made as to payment before payment was actually made, he could have sued upon the contract specially; or if he sued for work done at the request of the defendants, the contract would have been a part of his necessary proofs. The resolution of the council should be proved, and this is especially so in the case of a body or corporation like the council. It is far-fetched, indeed, to contend that a man is not concerned in the contract or security by which he can enforce payment. The council was concerned in the contract because it determined their obligation; and the defendant was concerned because it showed what the obligation was, and his right to enforce that obligation. Before payment is actually made, if a question arose as to the right of payment, is it to be said that the person who claimed to be entitled to the money could vote with reference to it—as to whether it was to be paid or not—or whether an action brought to enforce payment should be defended?

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Before I examine the cases referred to let me premise that applying decisions under one Act to the interpretation of another Act which uses different language, is, as Mr. Justice Wills said in *Pletts* v. *Campbell* (1), very often fallacious.

I take the cases in their order of date. First, then, I take the case of *Royse* v. *Birley* (2). There the question was whether a certain contractor who had performed his contract was disqualified from being elected, sitting, and voting as a member of the House of Commons. In that case it appeared that nothing remained to be done by the contractor when he was elected; the only thing that remained to be done was payment of *the contract price*. The Court held that the Act of Parliament, which I shall read, applied to executory contracts only—executory on the part of the contractor—and that as the goods in that case had been supplied at the time of the election, the contractor was not liable to the disqualification created by the Act. In my opinion, upon the words of the particular statute, it was rightly so held. What, then, is the Act? What does it provide? The Act is the 22 Geo. 3, c. 45, sect. 1 of which enacts that "any person who shall, directly or indirectly, himself, or by any person whatsoever in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, in the whole or in part, any contract, agreement, or commission, with the Commissioners of His Majesty's Treasury," &c., "or with any other person or persons whatsoever, for or on account of the public service, or shall knowingly and willingly furnish or provide, in pursuance of any such agreement," &c., "which he or they shall have made or entered into as aforesaid, any money to be remitted abroad, or any wares or merchandise to be used or employed in the service of the public, shall be incapable of being elected, or of sitting or voting as a member of the House of Commons during the time that he shall execute, hold, or enjoy any such contract, agreement, or commission, or any part or share thereof, or any benefit or emolument arising from the same." This plainly meant that the disqualification attached to the contractor only if he is elected, and takes his seat, and votes, whilst the contract is not executed by him. The

(1) [1895] 2 Q. B. 229, at p. 232. (2) L. R. 4 C. P. 296.

language we have to deal with is quite different. Nothing could be plainer than the language of Mr. Justice Montague Smith in *Royse* v. *Birley* (1). He says (pp. 316, 317) :—"I decide this case, so far as regards that contract, upon the ground that at the time of the election the contract was no longer executory, and nothing remained to be done but for the Government to pay the price of the goods. Looking at this Act of Parliament and the general tenor of it, I certainly am strongly of opinion that the Legislature intended it to apply only to contracts of a continuing nature, such as contracts for the building of works, and contracts for a recurring supply of goods, though I do not say that a contract for a single supply of goods is not within the terms which are used. But, to my mind, it very plainly appears that the statute did not mean to disqualify a contractor unless the contract was in an executory state on his part, that is to say, that something remained to be done by him; and that in no other way can the Act of Parliament be properly construed. The words 'undertake and execute,' in sect. 1, clearly apply only while the contract is executory; and, although the other words 'hold' and 'enjoy' are more general, it seems to me they refer to holding a contract or enjoying a contract which is executory, that is, a contract under which something has to be done by the contractor, either one act or recurring acts, and that he is only disqualified 'during the time that he shall execute, hold, or enjoy,' any such contract. The words 'hold' and 'enjoy' may have been inserted to meet cases where a contractor holding a contract did not himself execute it. The words 'during the time' clearly show that Parliament was contemplating a contract which would endure for some period of time, and that during that period of time something should remain to be done on the part of the contractor under that contract. The fourth and fifth clauses also point to contracts having some duration in point of time for the performance of that which the contractor was to do under them. I repeat that I do not say that if there is a contract for a single supply of goods, that contract is not within the Act so long as it remains to be performed on the part of the contractor, he having to supply the

(1) L. R. 4 C. P. 296.

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goods, and the Government having a right to find fault with and reject them. But when the contract is no longer executory on the contractor's part, and he is only a creditor of the Government, I do not think he can be said to 'execute, hold, or enjoy,' within the meaning of this Act of Parliament." This is the language of the learned Judge, dealing with a statute which, in its language, is quite different from article 12 of this Order that we have been dealing with. I agree with what Mr. Justice Montague Smith said, but the words he was interpreting were quite different from the words we have to interpret. The case of *Royse* v. *Birley* (1) does not in any way affect the view we originally expressed.

I now turn to the case in this country, *Connolly* v. *Fitzgerald* (2). That, too, depended upon a different statute, the Municipal Corporation Act, which uses different language from that with which we are concerned here; but really, in that case there was no question at all of a contract. The contract which Mr. Fitzgerald entered into with the Corporation of Cork had been merged in the award, which was made before his election; and his remedy was not upon a contract, but for debt upon an award. I regret we have no report of the judgment of the learned Judges who decided that case.

The decision of Darling, J., in *Cox* v. *Truscott* (3), to which we were referred yesterday, arises on a different statute, and certainly is not, as reported, a satisfactory one. I cannot help thinking that the true character of the judgment in *Royse* v. *Birley* (1) has been more than once overlooked.

We see no reason to alter the decision at which we had already arrived.

ANDREWS, J.:—

After judgment was given by the Court in this case on the 5th instant we were referred to two cases which had not been mentioned during the argument. One was the reported

(1) L. R. 4 C. P. 296. (2) Unreported. (3) 21 Times L. R. 319.

case of *Royse* v. *Birley* (1), and the other the unreported case of *Connolly* v. *Fitzgerald*, decided by the King's Bench Division in Ireland in the year 1893. Counsel on both sides having desired to be heard with reference to these cases, they were heard accordingly on the 12th instant.

Royse v. *Birley* (1) was a case of a parliamentary election, and turned upon the construction of the statute 22 Geo. 3, c. 45, which, for further securing the freedom and independence of Parliament, enacted (section 1) that any person who should directly or indirectly . . . *undertake*, *execute*, *hold*, or *enjoy*, in whole or part, any contract . . . for or on account of the public service, or should *knowingly* and *willingly* furnish or provide, in pursuance of such contract, ... any wares or merchandise to be used in the service of the public, should be incapable of being elected, or of sitting or voting as a member of the House of Commons, during the time he should *execute*, *hold*, or *enjoy*, any such contract, or any benefit arising from the same. This is very different language from that of the 12th clause in the Schedule to the Application of Enactments Order, 1898, which we have to construe in the present case. The contract in *Royse* v. *Birley* (1) was entered into in June, 1868, for the supply of goods for the public service of India. It was completely executed by the contractors by the 23rd of October. The goods had been supplied and accepted as satisfactory. Nothing remained to be done, but payment to the contractors. On the 18th of November one of the contractors was elected a member of the House of Commons. The contractors were not paid by the India Office until the following January, and it was held that, assuming the contract to be within 22 Geo. 3, c. 45, sect. 1, it did not avoid the election. Montague Smith, J., in the course of his judgment, said (page 317):—"I do not say that if there is a contract for a single supply of goods that contract is not within the Act so long as it remains to be performed on the part of the contractor, he having to supply the goods, *and the Government having a right to find fault with and reject them.* But when the contract is no longer executory on the contractor's part, and he is only a creditor of

(1) L. R. 4 C. P. 296.

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the Government, I do not think he can be said to '*execute, hold,* or *enjoy*' within the meaning of this Act of Parliament." Not only was the language of the Act in that case different from the language we have to construe in this case, but the facts were different, and I see no reason, from anything which was decided in that case, to alter the judgment I gave on the 5th instant in the present case.

The case of *Connolly* v. *Fitzgerald* (1) turned on the 58th section of the 3 & 4 Vict. c. 108, the Irish Municipal Corporation Act of 1840. That section enacted (amongst other things) that no person should be qualified to be elected, or to be, a councillor, alderman, or municipal commissioner of any such borough as therein referred to "during such time as he shall have directly or indirectly, by himself or his partner, *any share or interest* in any contract or employment with, by, or on behalf of, such council, commissioners, or charitable trustees," as are therein referred to. The contract in *Connolly* v. *Fitzgerald* (1) was not completed within the stipulated time, viz. by the 8th of April, 1892, and penalties were thereby incurred by the contractor. The Cork Corporation (with whom the contract was made) objected, therefore, to pay the contractor, Mr. Fitzgerald, and the differences between the parties were referred to arbitration, and, as I understand the facts, on the 15th of November an award was made settling all questions between the parties and leaving nothing to be done but to pay the contractor an ascertained sum. A cheque for his payment was accordingly drawn on the 18th of November, but was held over merely on account of want of funds to meet it. Mr. Fitzgerald was elected an alderman on the 25th of November, and acted as such on the 18th of January following, at or about which time the cheque was handed over to him and was paid, and he was held not to be disqualified. Here, again, both the language of the Act and the facts were different from what we have to deal with in the present case, and it is to be observed that, by the award on the 15th of November, the contractor's right to payment became a right not under the contract but under the award. We have not got the judgments of the learned Judges who decided the case of

(1) Unreported.

Connolly v. *Fitzgerald* (1), but I do not find anything in the decision of that case, having regard to its facts, to lead me to alter the judgment I gave in the present case, in which Mr. Hastings was admittedly disqualified at the time of his election (the 16th of January, 1905) by reason of his then uncompleted contract with the district council for printing, which was not then fully executed on his part, and under which he did printing work for the council on the 18th of January. Up to the 23rd of January his work had not been finally accepted by the council as entitling him to payment of any admitted sum in respect thereof. He took part in the proceedings of the council on that day before he was paid, and he afterwards received payment apparently on the same day. I think it, however, only just to Mr. Hastings to add that I see no ground for imputing to him any impropriety of conduct in relation to the payment he received, which I assume was justly due to him.

It is, in my opinion, immaterial that the total amount of his contract was not large, and that the amount of printing work which he did on the 18th January was small.

I can see no sufficient reason for limiting or qualifying the words "concerned in any contract with the council," so as to exclude this case. I am unable to entertain any doubt that Mr. Hastings was "concerned" in the contract both when elected, and when he acted as councillor on the 23rd January; and having regard to the terms of the 12th clause of the Application of Enactments Order, I retain the opinion I have already expressed that even if nothing had remained to be done on the 23rd January but to pay him, he would still have been "concerned," and materially "concerned," in his contract while he remained unpaid. If, however, either of the cases referred to, or any other case, can be held to be a binding authority against this opinion, it will not prevail if the net question in a like case should ever arise hereafter. If the recent case of *Cox* v. *Truscott* (2), before Mr. Justice Darling, as reported, is in conflict with my opinion, I would respectfully take leave to differ from it; but I do not look upon any of these cases as an authority against my opinion.

(1) Unreported.

(2) 21 Times L. R. 391.

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My judgment in this case, however, does not necessarily rest upon my opinion on this particular question, having regard to the facts of this case; and I am unable to hold that the disqualification of Mr. Hastings at the time of his election which rendered that election invalid and disqualified him "for being *elected* or *chosen* or *being* a member" of the district council, could be removed, and the invalid election be validated by the *subsequent* completion of the contract on his part; and, if so, he could not, in my opinion, be held to be otherwise than disqualified when he acted on the 23rd January.

On the question of his liability to be fined under article 12, clause (11), for acting when disqualified, he having been disqualified for being elected, I think it unnecessary to do more than refer to the principle involved in the cases of *Fletcher* v. *Hudson* (1) and *Hunnings* v. *Williamson* (2); and I have only to add that mere inconvenience or even hardship arising from any particular enactment is not sufficient to justify a Court in assuming legislative power by altering or adding to the enactment's plain words.

GIBSON, J.:—

Since I wrote and read the above judgment, which I have thought it right to leave unaltered, the attention of the Court was directed to two authorities in reference to which it allowed the case to be re-argued, the order not having been drawn up. The first of these—*Royse* v. *Birley* (3)—was decided on a statute widely different from the provisions of article 12. The latter was *Connolly* v. *Fitzgerald* (4) decided in 1893 by O'Brien, Johnson, Holmes, and Gibson, JJ. I had entirely forgotten the case, and have no recollection of the grounds of decision. The petition was to unseat Alderman Fitzgerald on the ground that his election was invalid by reason of 3 & 4 Vict. c. 108, sect. 58, which disqualifies for election a person during the time he has any interest in any contract with the council. The petition was presented on the 22nd of December, 1892. The facts were extremely strong. Fitzgerald had completed a contract made in 1891 for the

(1) 7 Q. B. D. 611.
(2) 11 Q. B. D. 533.
(3) L. R. 4 C. P. 296.
(4) Unreported.

construction of 126 artizans' dwellings. There was a dispute as to whether he was not liable to penalties for delay, and the matter was left to arbitration. The award was made on the 15th November, 1892. It ascertained that a certain balance on foot of the executed contract, less than his original claim, was due to Fitzgerald. On the 18th November, 1892, a cheque was drawn for the amount, the award being accepted as final and conclusive; but it was held over on a suggestion by Fitzgerald's opponents that there were not then sufficient funds. Fitzgerald was elected on the 25th November, 1892. Payment was still put off, on various pretexts, for some days after, under circumstances which suggested that the delay was a contrivance on the part of Fitzgerald's opponents. Fitzgerald, after his election, voted on the question of his own payment. On these facts the Court dismissed the petition. The grounds of the decision do not appear, as the case is unreported. The Court probably acted on the view that the contract having been executed, there was an admitted debt under the award, on which Fitzgerald was entitled, as creditor, to payment, and the delay was not *bonâ fide*.

Assuming, but not deciding, that those cases would apply to the language used in article 12, and that they decide that a contractor has no interest in a contract where it has been admittedly executed and the relation is merely that of creditor and debtor, I do not think that they can be extended further, or made to apply where due performance has not been admitted. The election Court must decide, then and there, as to the status of the candidate as actually existing at the time of election. It has no jurisdiction to determine, as against a party to the contract not before it, that the contract has been duly performed, and that payment is illegally withheld. If the performance of the contract and the right to payment are disputed, no matter what view may be taken by the election Court, the right of the council to resist the claim is not affected. The existence of a dispute, though the contractor was in the right, would make it impossible to affirm that the contractor was not interested in the contract of the breach of which he was complaining. On the other view, a contractor could be elected, and vote and influence the council in reference to his disputed claim and litigation. Where legal dispute is competent, and there

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has been no admission of debt, the same principle should apply. It would be curious if, after the election Court had decided, in the absence of the other contracting party, that the contract was duly executed, payment was afterwards resisted—whether successfully or not—on the ground that the contract was still open. The two authorities relied on (if the language of the legislation there before the Court is to be regarded as equivalent to article 12) proceed on the view that there was an admission of liability placing the employing authority in the same position as a private person who had stated an account, or had passed an I.O.U. or note for the amount. If the matter was to be dealt with apart from dicta or authority, there would seem strong ground for contending that a contractor who is owed a debt, which he can only recover by directly proving his contract, and that such contract has been violated by the council in refusing or delaying payment, is within the language of article 12, though the mere relation of debtor and creditor *per se*, and apart from contract, would impose no disqualification. At all events, until liability is admitted, or finally established—and it must be recollected that a verdict, judgment, and award, are all subject to review for a time—and while dispute, as to performance, is competent, the contractor cannot be said to have no concern in the contract and its profit.

This brings me to the two points of distinction, which—referred to in my earlier judgment—are relied on as making *Fitzgerald's Case* (1) inapplicable. The first is, that liability was there established by an admittedly valid award on which, without relying on contract, an action could have been maintained. In *Birley's Case* (2) the legislation was quite different; and the case stated showed that the goods had been accepted, and that an admitted debt was due. Here the due execution of the contract and the liability of the council for the debt were not, and could not have been, admitted till the meeting at which Mr. Hastings took part as a member. The first duty of the meeting was to elect a chairman; and it does not appear that Mr. Hastings took any part in relation to his claim, or, indeed, whether the matter was discussed. Until the meeting,

(1) Unreported. (2) L. R. 4 C. P. 296.

however, was over, the claim could certainly have been investigated and disputed. It is not necessary to decide whether *Birley's Case* (1) or *Fitzgerald's Case* (2) applies to the language of article 12, or whether a revocable admission of liability on foot of an executed contract, short of an account stated, would take a contractor out of the operation of the article in a case where, if payment was wrongfully delayed and withheld, it would be necessary to rely on the contract directly to enforce payment. Such a case would differ widely from one where there had been an account stated, a final judgment, or award. There a debt would exist apart from the original contract.

The second point of distinction is that, even if the contract was at an end on the 18th, it was open at the time of election. Mr. Hastings was clearly disqualified for election, and it is argued that such initial disqualification prevents him from being *de jure* councillor during that term of office, and brings him within sub-section 11. On the former day I expressed the opinion that this view was correct. I have carefully considered the matter since, and though the point appears more doubtful than it did, I adhere to my conclusion. The argument from inconvenience, that if a disqualified member against whom no petition has been presented cannot sit and vote, the constituency is disfranchised, I dismiss. The inconvenience of allowing a disqualified person whose disqualification may be unknown to, or concealed from, the voters or council, to act merely because his *status* has escaped challenge, appears equally great. It may be better for a constituency to be unrepresented than misrepresented. Our decision must depend on the wording of the article, which is drastic and expressed without qualification.

Some of the disqualifications precede election, and I cannot doubt that a person who has been convicted under sub-sect. 4 (*c*), notwithstanding that he has not been petitioned against, if he acted would be liable under sub-sect. 11. The word "disqualified" is a strong one (as is remarked in *Franklin's Case* (3)) and imports that the person disqualified cannot act *de jure*: see article 11, sub-sect. 6. Disqualification should not be intermittent. Once it

(1) L. R. 4 C. P. 296. (2) Unreported. (3) I. R. 6 C. L. 239.

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attaches, it cannot be got rid of by mere lapse of time without a new election. It is urged that *Lewis* v. *Carr* (1) is an authority that disqualification is temporary, and when removed the member may lawfully act. That was a case relating to supervening want of qualification after a valid election, and was decided on the effect of want of qualification during a contract. The Court held that the contractor ceased to be qualified only during the contract. The word "disqualified" did not occur in relation to the contract dealt with by sections 28 and 53 of 5 & 6 Wm. 4, c. 76, which the Court had to construe. In *Fletcher* v. *Hudson* (2), which was a case on a rule in the schedule to the Public Health Act of 1875, where the words "disabled from acting" were used, the Court of Appeal (Bramwell, L.J., dissenting) distinguished *Lewis* v. *Carr* (1), and held that a supervening disqualification arising from a contract, executed and paid, disabled the member from acting until he had been re-elected. The rule there no doubt expressly declared that the office was to become vacant. There is no such provision here; but sub-section 10 orders that on disqualification the council are to declare the office vacant, and the office shall thereupon become vacant. The council might, however, be unaware of the disqualification, or they might neglect their duty.

The member must be taken to know his own disqualification, and, whether the council knows the disqualification and avoids the election or not, he incurs the penalty if he acts, notwithstanding that the original cause of disqualification has determined. Once the disqualification has destroyed his lawful *status*, it cannot be regained under article 12 without a new election.

If *Fletcher's Case* (2) applies to a supervening disqualification under article 12, does the same principle apply to a disqualification affecting the validity of the election? The reasoning in *Hunnings* v. *Williamson* (3) points in that direction. The moment that disqualification exists, the continuity of legal membership becomes impossible. A membership invalidated at its birth ought not to stand in a better position than a membership invalidated by matter subsequent. Article 12 treats both cases as governed by the same

(1) 1 Ex. D. 484. (2) 7 Q. B. D. 611. (3) 11 Q. B. D. 533.

rule. It does not put a disqualified person, who could have been, but has not been, removed on election petition, in a better position than a person who becomes disqualified after election and has not been removed. The argument that the constituents are deprived of representation (where there is no election petition) if the disqualified candidate cannot act, has been already answered. Admittedly, so long as disqualification continues—and such disqualification often arises from the member's own voluntary act—the member cannot vote.

If the contract is supposed to have been executed on the 18th, and there was an admitted debt on that day, was the previous disqualification then determined, leaving Mr. Hastings at liberty to act *de jure* as councillor for the rest of the term? I do not think that the article can be construed as imposing an intermittent disqualification. It does not suspend the offending member; it disqualifies and prohibits from acting in the office which the disqualified member illegally fills.

In my opinion, Mr. Hastings is liable under section 11 for two reasons, either of which would be sufficient to support a conviction. He acted before his claim under the contract was vouched, passed, and admitted, and while he was concerned and interested therein; and having been elected when disqualified he was disabled from acting in the office, from which he ought to have been removed, and which he filled illegally.

At the last moment, shortly before judgment was to be delivered, Mr. O'Connor referred us to another case: *Cox* v. *Truscott* (1)—a decision of Darling, J., on the statute of 1882. That enactment is not at all the same as article 12, which is more like the Act of 1894 (56 & 57 Vict. c. 73, sect. 46). The words were "if and while"; and Darling, J., appears to have thought *Lewis* v. *Carr* (2) and *Royse* v. *Birley* (3) ruled the case. For the reasons already assigned I think the decision distinguishable. If it is not, I cannot agree with it. The case exhibits a curious result. There was a continuing arrangement for the supply of coals. When each delivery was ordered, and till it was supplied, the defendant was disqualified; but after each delivery was complete, he was held

(1) 21 Times L. R. 319. (2) 1 Ex. D. 484. (3) L. R. 4 C. P. 296.

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entitled to sit and vote till the next supply of coal was ordered. This humorous alternation of recurring disqualification and qualification, if possible under article 12, would enable the mischief against which the article was directed to be effected with impunity.

Solicitor for the appellants: *P. S. Golding.*
Solicitor for the respondent: *P. J. B. Daly.*

J. G. T.

K. B. Div. Probate. 1905. May 15. June 20, 29.

In the GOODS of HELEN A. MADDEN, Deceased (1).

Will—Separate pieces of paper fastened by pin—Signature and attestation clause put first (in the opinion of the Court inadvertently) after execution.

Testatrix wrote her will on several sheets of paper pinned together. At the time of application for probate, the testatrix's signature and the attestation clause was the first of these papers.

The Court, being of opinion on the evidence that the sheet containing the signature and attestation clause was originally written last, and therefore at the end of the will, and might have been afterwards inadvertently misplaced, granted probate.

Character of evidence to sustain an application on such grounds considered.

Application by Miriam Madden, executrix of the executor of deceased, that the will of Helen A. Madden be admitted to probate, notwithstanding that the same was written on four separate sheets of paper pinned together, and what should be the last sheet, with signature of testatrix and attestation clause duly signed by witnesses, was pinned in front.

The will was dated 29th June, 1885, and was witnessed by the Rev. J. F. Peacocke (now Archbishop of Dublin) and Mr. Greenwood Pim. The testatrix died 26th November, 1892. By her will she appointed that her husband, John E. Madden, in case he should survive her, should stand possessed of a sum of £7000, subject to certain legacies of £1500, for his own use, and appointed him sole executor and residuary legatee. Her husband (John E. Madden) survived testatrix, and married applicant on 4th October,

(1) Before Andrews, J.

1899; he died August 19th, 1904, without having proved the will of deceased.

By his will he appointed Miriam Madden his sole executrix.

The will of Helen A. Madden was written on four separate sheets of paper; the signature of testatrix and those of the attesting witnesses were on one sheet, which was pinned in front of the other three sheets, and was in the same position when received by Mr. Shannon (the solicitor for the applicant) from Messrs. Longfield, Kelly, & Armstrong (solicitors for legatees) in January, 1905. There were indications that the pin had been moved on some occasion, as there were several pin-marks on the corners of the sheets. It appeared from the affidavit of applicant that the whole will was in the handwriting of testatrix. It was believed to have been copied by her from a former will, or form of will, prepared by Mr. F. Dames, Q.C. The attesting witnesses made affidavits in which they stated they could not recollect in what position the sheets were at the time of witnessing the will, but that they knew the signature should be at the foot of a will, and that they would not knowingly witness a will signed in front.

Gordon, K.C., and *John H. S. Russell*, for the applicant:—

The Court, if satisfied that the signature of testatrix was intended to be placed so as to give validity to something already written, should hold this to be a will. The attestation clause says: "Signed by me, the said Helen A. Madden," which would imply that same was written after the other sheets, and not before them. It is not necessary that all the papers constituting the will should be connected together. Where we find four separate sheets, and one sheet only contains the signature of testatrix and attestation clause, the clear inference to be drawn is that such was to give validity to the other sheets written at the same time, and which subsequently may have been pinned together as they now are: *Goods of Wotton* (1); *Birch* v. *Birch* (2); *Goods of Jones* (3).

Conner, K.C., and *W. G. Gibson*, for the next-of-kin:—

There is no reasonable evidence for the Court to assume that

(1) 3 P. & D. 159. (2) 6 Notes of Cases, 581. (3) 4 Sw. & T. 1.

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this will is in conformity with the requirements of the Wills Act: *Boyle* v. *Harris* (1); 15 Vict. c. 24, s. 1.

Oulton, K.C., for legatees under the will, cited *Gregory* v. *Her Majesty's Proctor* (2); *Goods of Horsford* (3); *Goods of Rice* (4).

June 29. ANDREWS, J.:—

After a careful consideration of the evidence which has been adduced, and a close inspection and examination which I have made of the four sheets of paper which are presented as comprising the will of the late Mrs. Helen Annie Madden, I have felt myself at liberty to come as I do to the conclusion that what she wrote on those sheets was all written at the same time, and that the sheet now pinned in front was written last, and that when it was signed the four sheets were all together in the same place (see Jarman on Wills, 4th ed., p. 84; *Bond* v. *Seawell* (5)). The character of all the paper is the same. The handwriting is the same, and is all uniform, and it appears to have been all written with the same ink. The four sheets were manifestly written to constitute a will, and if the sheet now pinned in front be placed at the end, the four sheets will read consecutively as constituting a perfectly formal will, ready for execution. The internal evidence which the will affords shows that the person who purports to be the writer of it was Mrs. Helen A. Madden, and it is proved to be all in her handwriting by the affidavit of Mr. Richard Owen Armstrong. I have also come to the conclusion that when the four sheets were written they were separate and unconnected. It will be observed that the writing on the sheet now pinned in front begins with a formal attestation clause, commencing with the words, "Signed by me, the said Helen A. Madden," which assists the conclusion I have come to, that this sheet was written last. I would be quite unable to come to the conclusion that when writing out what she manifestly intended to constitute her will she began with this attestation clause, which I regard as referring to what she had already written. A will may

(1) [1895] P. 168.
(2) 4 Notes of Cases, 620.
(3) 3 P. & D. 211.
(4) I. R. 5 Eq. 176.
(5) 3 Burr. 1775.

consist of several separate unconnected sheets of paper. It is not disputed that if the sheet now pinned in front was the last sheet the will was duly executed pursuant to the Wills Act, 1 Vict. c. 26, as amended by the Act, 15 Vict. c. 24; and as I hold that the sheet now pinned in front was the last sheet written, and therefore was, when written, at the end of the will, it would not, in my opinion, have ceased to be at the end of the will by having been misplaced, assuming that it was pinned in front at the time it was signed. Even if, therefore, it was pinned in front when signed, such misplacement of it would not have prevented it from continuing to be in fact the last sheet, and the execution of the will under those circumstances would have been valid. But there is no proof that this sheet was so misplaced when signed.

It may have been signed before the sheets were pinned together, and there are also evidences that their present attachment by the pin which now connects them was not always the same.

One of the witnesses (the present Archbishop of Dublin) who attested the deceased's signature has made an affidavit in which he states that he knew it was necessary to sign a will at the foot or end, and that he would not have knowingly attested a will signed at the beginning; and the other witness to the deceased's signature (Mr. Greenwood Pim) has made an affidavit in which he states that he knew a will must be signed at the end, and would not knowingly attest a will on its first page; even in the absence, therefore, of authorities, I would hold that this will was duly executed; but (amongst others) the case of *Gregory* v. *Her Majesty's Proctor* (1) (which recognises it as decided that all the papers of which a will consists need not be connected together), the case of *The Goods of Wotton* (2), which in some respects is similar to the present case, and the case of *The Goods of Jones* (3), cited with approval in *The Goods of Rice* (4), in my opinion, support the conclusions I have come to. In *The Goods of Jones* (3) the Judge said, "There is proof satisfactory to the Court that the testator intended the signature as the execution of the codicil" (as I think it manifest that the deceased in the present case intended her signature as the execution of

(1) 4 Notes of Cases, 620.
(2) 3 P. & D. 159.
(3) 4 Swa. & Tr. 1.
(4) I. R. 5 Eq. 176.

K. B. Div. 1905. In re MADDEN. Andrews, J.

the will), "and made it in the presence of two witnesses as required by law" (this is not disputed in the present case). "The question is whether the fact of execution, thus fully and duly made out in other respects, is to be annulled by reason of the unusual position which the signature occupies. This the Court is most unwilling to do. *Ut res magis valeat quam pereat* is a sage and sound maxim. Within the limits of reasonable construction the Court is prepared to go all lengths to save a genuine act of execution from entanglement and defeat by formal requirements. Such is the spirit of the Amendment Act passed by Lord St. Leonards" (*i.e.* 15 Vict. c. 24).

The facts in the case of *The Goods of Jones* (1) were not the same as the facts in the present case, but much of what I have quoted is applicable in principle.

The order I shall make will, therefore, be that Mrs. Miriam Madden, as the sole executrix of the late John Eccles Madden, who was the residuary legatee in the will of Mrs. Helen A. Madden, deceased, dated the 29th June, 1885, and which said will the Court doth declare and decide to have been duly executed, be at liberty to apply for a grant of administration with the said will annexed, and that the said will shall be so set forth in the said grant that what is written on the sheet of paper now pinned in front thereof shall be set forth as at the end of the said will; and I shall also order (this not being a matter in dispute, and Mrs. Miriam Madden so consenting) that the figures altered in the body of the said will to £2000 do stand as £2000. The order will also provide that Mrs. Miriam Madden will be entitled to retain her costs of this application out of the assets when she extracts the grant, and that the next-of-kin of the deceased testatrix will also be entitled to be paid their taxed costs of this application out of the assets.

Solicitor for the applicant: *W. J. Shannon.*
Solicitors for the next-of-kin: *S. S. & E. Reeves & Sons.*
Solicitors for the legatees: *Longfield, Kelly, & Armstrong.*

W. L.

(1) 4 Swa. & Tr. 1.

BOYERS & CO. *v.* D. & R. DUKE (1).

(1904. No. 4798.)

K. B. Div. 1904. Nov. 7, 16.

Contract—Acceptance—Offer, or invitation of offer—Application for "quotation"—Quotation furnished.

Plaintiffs wrote to defendants (canvas manufacturers):—"Please give us your lowest quotation for 3000 yards of canvas, 32½ inches wide, to the enclosed sample, or near, and your shortest time for delivery." Defendants replied—"We enclose sample nearest we have to match yours. Lowest price, 32½ inches wide, is 4⅝*d.* per yard 36 inches measure. Delivery of 3000 yards in 5/6 weeks." Plaintiffs replied to this—"Please get made for us 3000 yards canvas, 32½ inches wide, as per your quotation, at 4⅝*d.* per yard; deliver same as quickly as possible. Also please quote us for same 52 inches wide for quantity of about 20,000 yards annually. As we have not had the pleasure of doing business with you before, we give you as reference," &c., mentioning two firms:—

Held, that defendants' letter was not an offer to sell, but merely a quotation of terms on which plaintiffs might offer an order; that the plaintiffs' letter in reply was an offer of an order, and not an acceptance of an offer; and that there was no completed contract between the parties.

MOTION on behalf of the plaintiffs to set aside the verdict and judgment entered for the defendants, and enter verdict and judgment for the plaintiffs for £29 13*s.* 9*d.* and costs.

The action was brought by the plaintiffs, drapers, residing at North Earl Street, Dublin, against the defendants, linen manufacturers, carrying on business in Forfar, Scotland, claiming damages for breach of contract in not delivering 3000 yards of canvas. The plaintiffs had, on the 23rd February, 1904, written to the defendants in the following terms:—"Please give us your lowest quotation for 3000 yards of canvas, 32½ inches wide, to the enclosed sample, or near, and your shortest time for delivery, and oblige." The defendants replied on the 24th February:—"We enclose sample No. B 3932, nearest we have to match yours also enclosed.

(1) Before LORD O'BRIEN, L.C.J., and GIBSON and MADDEN, JJ.

K. B. Div. 1904. BOYERS v. DUKE.

Lowest price, 32½ inches wide, is 4⅝d. per yard, 36 inches measure. Delivery of 3000 yards in 5/6 weeks."

The plaintiffs wrote to defendants on the 3rd March:—

"Please get made for us 3000 yards canvas, 32½ inches wide, as per your quotation, February 24, at 4⅝d. per yard; deliver same as quickly as possible. Also please quote us for same 52 inches wide for quantity of about 20,000 yards annually. As we have not had the pleasure of doing business with you before, we give you as reference Messrs. Baxter, Brothers, Dundee; Messrs. Richards, Limited, Aberdeen. Canvas No. B 3932.—BOYERS & Co.

"Also please quote us for canvas to enclosed sample 52 inches, and oblige."

The defendants, on the 7th March, wrote to plaintiffs that they had made a clerical error in quoting 4⅝d., as the price should have been 6⅝d. Plaintiffs replied that they had sold 3000 yards of the canvas at a small profit on defendants' quotation of 24th February, and must, under the circumstances, hold the defendants to their contract.

The plaintiffs in the present action claimed damages for breach of contract for the sale and delivery of the canvas, alleging, in alternative counts, a contract to deliver (*a*) in five to six weeks from 24th February; (*b*) in five to six weeks from 3rd March; (*c*) as quickly as possible after 3rd March.

The action was tried before Wright, J., and a common jury of the city of Dublin. The jury found, in answer to questions left to them, that the offer or quotation in defendants' letter of the 24th February was made subject to acceptance within a reasonable time; that the plaintiffs accepted within a reasonable time; that the price, 4⅝d. per yard, quoted in the defendants' letter of the 24th February, was inserted by defendants by mistake for 6⅝d., but that the plaintiffs did not know that it was inserted by mistake. By direction of the Judge, the jury found for the defendants, and judgment was given for the defendants with costs.

Chambers, K.C. (with him *Littledale*), for the plaintiffs:—

The letter of the 24th February from the defendants to the plaintiffs, although called a quotation, is really an offer to sell. It contains all the necessary elements of an offer, namely, the

nature and quality of the goods, the price, and the time for delivery. This offer was accepted by the plaintiffs' letter of the 3rd March. That letter amounts to an absolute and unqualified acceptance. The words "deliver same as quickly as possible" do not import a fresh term, but merely mean as soon as possible within the five or six weeks named by the defendants for delivery. The giving of references applies only to the subsequent portion of the letter proposing future business. *Harvey* v. *Facey* (1) is relied on by the defendants. That was a case of the sale of land, and not of goods; but in any event it does not govern the present case. In *Harvey* v. *Facey* (1) two questions were asked in the appellant's telegram: the first as to the willingness of the respondent to sell; the second asking the lowest cash price; and the respondent replied to the second question only—the question "Will you sell?" was left unanswered. The appellant's telegram, therefore, merely amounted to this, that if he ever did sell, he would take £900.

Serjeant Dodd and *Gerald FitzGibbon*, for the defendants:—

We contend, first, that the letter of the 24th February was not an offer, but merely what on its face it purports to be, a quotation, that is an invitation to make an offer, and that the plaintiffs' letter of the 3rd March is not an acceptance of an offer, but an offer. The defendants here are manufacturers; they do not keep the canvas in stock, but have to make it from time to time. Between the defendants' letter of the 24th February, and the plaintiffs' letter of the 3rd March, the defendants might have accepted a number of contracts which would prevent them delivering the canvas within the time mentioned. The reference in the defendants' letter of 24th February to delivery within five or six weeks, must mean within five or six weeks from the date of that letter. The plaintiffs, therefore, if their contention is right, would have been entitled to delivery within five or six weeks from the 24th February, even though their order had not been given until three or four weeks after that date. The giving of references in the letter of the 3rd March was clearly intended to apply to the

(1) [1893] A. C. 552.

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order for the 3000 yards, as well as the future business, and shows that this letter was merely an offer. Suppose the references had turned out unsatisfactory, could it be contended there was a contract?

Secondly, even assuming that the letter of the 24th February amounted to an offer, and the reply of the 3rd March is to be taken as an acceptance, the necessary elements of a contract are wanting. How were the goods to be paid for? No doubt in the case of the sale of specific goods, in the absence of an agreement to the contrary, the law presumes that payment is to be by cash on delivery; but there is no such presumption where the goods are to be manufactured, and the transaction is one, not of sale, but of work to be done and materials supplied.

Thirdly, treating the letter of the 3rd March as an acceptance of an offer, it is not an unconditional acceptance; it introduces a new term, namely, that the canvas is to be delivered "as quickly as possible." This implies that extra expedition is to be used, and not merely that the work is to be done within a reasonable time: Addison on Contracts, 10th ed., p. 178; *Hydraulic Engineering Co.* v. *M'Haffie* (1).

Harvey v. *Facey* (2) is dealt with in all the text-books as a decision upon the rules governing acceptance generally, and it is nowhere suggested that it rests upon a principle peculiar to the sale of land: Leake on Contracts, 4th ed., p. 13; Anson on Contracts, 7th ed., p. 42; Addison on Contracts, 10th ed., p. 15.

Littledale, in reply:—

The presumption that goods are to be paid for on delivery applies to goods to be manufactured as well as to existing goods: Sale of Goods Act, 1893, ss. 5 (1), 28. The provision for delivering within five or six weeks means within five or six weeks from acceptance, and would, of course, be subject to the condition, which the jury find to have been fulfilled, of acceptance within a reasonable time.

Cur. adv. vult.

(1) 4 Q. B. D. 670. (2) [1893] A. C. 552.

LORD O'BRIEN, L.C.J.:—

The short question in this case is, whether these letters or documents which passed between the plaintiffs and the defendants constitute a completed contract—whether they amount to an offer and an acceptance of the offer, or to a quotation and an order? If they amount to the former, they constitute a contract; if to the latter, that is to say to a quotation and order, they do not constitute a contract. The action in which the question arises was brought by the plaintiffs against the defendants for alleged breach of contract for the supply of canvas. Certain questions were submitted to the jury which do not help in the determination of the controversy before us. The controversy arises, as I have said, upon the construction of the documents. My brother Wright, who tried the case, held that they did not constitute a completed contract, and we are of opinion he was right in so holding.

What, then, are these documents? The first is dated the 23rd February, 1904, from the plaintiffs to the defendants, and is in the following terms:—"Please give us your lowest quotation for 3000 yards of canvas, 32½ inches wide, to the enclosed sample, or near, and your shortest time for delivery, and oblige," &c. Now, this is expressly a request for a quotation. The reply is dated the 24th February, 1904, and is as follows:—"We enclose sample, No. B 3932, nearest we have to match yours, also enclosed. Lowest price, 32½ inches wide, is 4⅝*d.* per yard, 36 inches measure. Delivery of 3000 yards in 5/6 weeks." This, in my opinion, amounts only to a quotation. Certainly quantity, price, and time of delivery are stated, but I think it is nothing more than a statement of their ability to turn out the subject-matter at a certain price at a certain time, and not an offer to sell it at the price, and to deliver it within the time, mentioned. It amounted to nothing more, in my opinion, than a quotation in reply to a request for one.

Now comes the third and last letter, which is said by the plaintiffs to be an acceptance of an offer to sell on certain terms. It is dated March the 3rd. I shall read it: "Messrs. D. & R. Duke, Brechin, N.B. Gents,—Please get made for us 3000 yards of canvas, 32½ inches wide, as per your quotation, February 24th, at 4⅝*d.* per yard; deliver same as quickly as possible. Also please

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Lord O'Brien, L.C.J.

quote us for same, 52 inches wide, for quantity of about 20,000 yards annually. As we have not had the pleasure of doing business with you before, we give you as reference Messrs. Baxter, Brothers, Dundee; Messrs. Richards, Ltd., Aberdeen. Canvas No. B 3932.—(Signed) BOYERS & Co. Also please quote us for canvas to sample enclosed, 52 inches, and oblige, B. & Co."

Is this an acceptance of an offer, or an order? In my opinion it is not the acceptance of an offer, because the letter to which it was a reply was a quotation and not an offer.

This letter is nothing more than it purports to be, namely, an order based on a quotation. The words are:—"Please get made for us 3000 yards of canvas, 32½ inches wide, as per your *quotation*, February 24th." The first letter, that is to say, the letter of the 23rd February, asked for a quotation; the letter of the 24th sent what was asked for; and the plaintiffs' letter of the 3rd March expressly refers to the letter of the 24th, as "per your quotation, February the 24th."

Light is also thrown upon the true character of the letter of the 3rd March by the giving of references as therein, which is certainly far more compatible with the giving of an order, or offer to purchase, than with a completed contract. The words "as quickly as possible" in the letter of the 3rd March would perhaps point to an uncompleted contract, but I think this criticism is so minute that much weight is not to be attached to it.

We are of opinion that my brother Wright's view was correct, and that judgment should be for the defendants.

GIBSON, J.:—

Was defendants' letter of February 24th, written in reply to plaintiffs' inquiry of February 23rd, an offer to sell on the terms therein stated? If it was, the plaintiffs' letter of March 3rd might be considered an acceptance, and there would be a binding contract. The defendants contend that the letter of February 24th was not a proposal to sell, but a quotation of terms to enable the plaintiffs to offer them an order; this offer, if made, defendants were at liberty to decline, if the state of their business as manufacturers, or rise of prices, or the plaintiffs' financial position on inquiry, made such course expedient. It is suggested for the

plaintiffs that defendants' only reason for denying the existence of a contract is that there was a mistake in the price quoted. Whatever was the reason—whether mistake, rise of price, or otherwise—what we have to determine is whether there was a proposal to sell followed by an acceptance. It is very much a question of mercantile fact. If the letter of February 24th was an offer to sell, and such offer was accepted, there is a contract of sale. It contains all the terms necessary as the basis of a complete contract by a manufacturer—price, quantity, dimensions, and time of delivery. Looking at all the circumstances, was it a proposal to sell, the acceptance of which would make a binding bargain?

When I read the letters first, I thought, as all the ingredients of an offer were present, the Court should place that meaning on the document, which, read by itself, would seem to be an offer to sell. Serjeant Dodd, however, relies on the following points, as repelling the inference of final offer:—(1) The letter of February 23rd asks for a quotation, and is addressed to a manufacturer; (2) the letter of February 24th, in reply, must be taken as giving the required quotation; it does not prescribe a time for acceptance; it does not profess to sell; and the period of delivering, five or six weeks, may be reckoned as from the date February 24th; (3) the letter of March 3rd is not phrased as an acceptance; it purports to be an order as per quotation; asks delivery "as quickly as possible," without any express reference to five or six weeks; and in the final clause offers a reference. This proposed reference, which appears in a separate paragraph of the letter, relates (it is said) to the 3000 yards as well as to future business.

The pleading treats the suggested contract as ambiguous; in one of the counts it makes the period of delivery run from the 24th February; and in another construes the words "as quickly as possible" as an independent term, though in that view there could be no concluded contract, as the letter of March 3rd would not then be an unqualified acceptance of the terms offered.

The *Jamaica Case* (1) relied on by the defendants is clearly distinguishable, and is important only as deciding that the question of contract should not be left to doubtful inference.

The case is a difficult one; but, taking all the circumstances

(1) [1893] A. C. 552.

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together, though I cannot accept the entire of defendants' argument—particularly as to the commencement of the five or six weeks—and the view that the words "as quickly as possible" displace the six weeks' limit, I am not satisfied that a concluded contract is made out. If the plaintiffs' reference had proved unsatisfactory, could not the defendants have declined to execute the order? The letter of March 3rd, following the letter of February 23rd, is much more like an order, offered on the basis of a quotation, than the acceptance of a proposal to sell by which plaintiffs understood the defendants to be bound.

MADDEN, J.:—

The defendants in this case were asked for a "quotation." Now the word "quotation" is capable of different meanings according to the connexion in which it is used, but there is a common idea underlying them all, that of notation or enumeration. The things quoted may be passages in an author, the prices of specific articles, or the terms upon which work is to be done. In the case before us both parties agree that the documents before us must be read and construed, giving the words the ordinary meaning which they bear in the English language, having regard to the subject-matter to which they relate; for neither party has contended that evidence should have been taken as to the use of the word "quotation" in mercantile transactions.

A quotation might be so expressed as to amount to an offer to provide a definite article, or to do a certain work, at a defined price. But the ideas of a quotation, and of an offer to sell, are radically different. The difference is well illustrated by the case of *Harvey* v. *Facey* (1). There, to a telegram in these terms, "Will you sell us B. H. P.? Telegraph lowest cash price," the answer was returned, "Lowest price for B. H. P., £900." The inquirer telegraphed, "We agree to buy B. H. P. for £900 asked by you." An exceptionally strong judicial committee of the Privy Council, in a judgment delivered by Lord Morris, held that the statement, or quotation, of the lowest price at which a definite thing will be sold, does not import an offer to sell.

The principle on which this case was decided applies with a

(1) [1893] A. C. 552.

greater force to mercantile transactions than to an application for a statement of the price of a single parcel of land. It is a matter of common knowledge that quotations of prices are scattered broadcast among possible customers. Business could not be carried on if each recipient of a priced catalogue offering a desirable article—say a rare book—at an attractive price, were in a position to create a contract of sale by writing that he would buy at the price mentioned. The catalogue has probably reached many collectors. The order of one only can be honoured. Has each of the others who write for the book a right of action? Wholesale dealers have not in stock an unlimited supply of the articles the prices of which they quote to the public at large. This stock usually bears some proportion to the orders which they may reasonably expect to receive. Transactions of the kind under consideration are intelligible and business-like, if we bear in mind the distinction between a quotation, submitted as the basis of a possible order, and an offer to sell which, if accepted, creates a contract, for the breach of which damages may be recovered.

These observations seem to apply with special force to a quotation furnished by a manufacturer, in the position of the defendants, stating the terms on which he is prepared to work, as to price and time for completion. He may receive and comply with many applications for quotations on the same day. If his reply in each case can be turned into a contract by acceptance, his looms might be burdened with an amount of work which would render it impossible for him to meet his engagements. In my opinion, a merchant, dealer, or manufacturer, by furnishing a quotation invites an offer which will be honoured or not according to the exigencies of his business. A quotation based on current prices usually holds good for a limited time. But it remains a quotation, on the basis of which an offer will not be entertained after a certain date. I have arrived at this conclusion irrespective of the terms of the letter of the 3rd of March, as to which I will only say that it suggests to my mind that the writer knew well that he was giving an order, not accepting an offer for sale.

Solicitor for plaintiffs: *W. H. Spence.*

Solicitors for defendants: *Frederick Sutton & Son.*

J. G. T.

K. B. Div. 1905.

IN RE THE FINANCE ACT, 1894, AND COCHRANE (1).

June 16, 21, 29.

Revenue—Estate duty—Settlement—Gift inter vivos—*Interest retained by settlor—Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12), *section* 38 (2), *as amended by the Customs and Inland Revenue Act*, 1889 (52 *Vict. c.* 7), *section* 11, *and the Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *section* 2 (c).

C. made a settlement more than twelve months before his death, whereby he conveyed a mortgage debt of £15,000 to trustees, upon trust to pay £575 of the income to his daughter S. for life, and after her death in trust for her children who should answer a particular description, with power, however, by her will, to appoint to her husband during his life a yearly sum of £300, payable out of the income. If there should be no child who would answer the description specified, the trustees were to hold the trust funds after the death of S. (but subject to the annuity to S.'s husband) in trust for C. absolutely. The trustees, during the life of S., were to hold the balance of the income, after the payment of the yearly sum of £575 to S. or the annuity to S.'s husband, upon trust for C. absolutely :—

Held, that, upon the death of C., neither the ultimate contingent trust for C. of the *corpus* of the fund, nor the trust for C. of the surplus income, rendered the gift one "of which *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise," within the meaning of clause (a) of the Customs and Inland Revenue Act, 1881, sect. 38 (2), as amended by sect. 11 of the Customs and Inland Revenue Act, 1889, and the Finance Act, 1894, sect. 2, clause (c) (2).

Held, also, that the settlement did not reserve to the settlor any interest "for life, or any other period determinable by reference to death," within the meaning of clause (c) of the Customs and Inland Revenue Act, 1881, sect. 38 (2), as amended by sect. 11 of the Customs and Inland Revenue Act, 1889, and the Finance Act, 1894, sect. 2, clause (c) (2).

Held, therefore, that neither estate duty nor "settlement estate duty" was payable by the executors of C. in respect of such part of the £15,000 as constituted the benefits conferred upon S., her issue and her husband.

Held, also, that "estate duty," but not "settlement estate duty," was payable in respect of the expectancy of C. in the £15,000, in the event of there

(1) Before PALLES, C.B., and JOHNSON and KENNY, JJ.

(2) Section 38 (2) of the Customs and Inland Revenue Act, 1881, defining property to be included in an account, as amended by section 11 of the Customs

being a failure of children to take under the trusts, but that the executors were entitled to postpone payment until the interest might fall into possession.

Held, also, that estate duty, but not settlement estate duty, was payable in respect of the principal value of the interest of C. during the lifetime of S. in the surplus income over the £575 a-year.

K. B. Div. 1905.

In re COCHRANE.

PETITION.

By an indenture of September 4, 1902, between the late Sir Henry Cochrane of the one part, Ernest Cecil Cochrane and James Robertson Coade as trustees of the other part, Sir Henry Cochrane directed and declared that the trustees should stand possessed of the sum of £15,000, and all interest to become due on same, and the benefit of all securities for the same, in trust out of the income to pay the sum of £575 to Sara Elizabeth Graham Day for her life for her separate use, without power of anticipation, and after her decease, in trust, as to the said sum of £15,000, for such child or children, or remoter issue, of Sara Elizabeth Graham Day, by her present or any after-taken husband, at such age or time, or ages or times (not being earlier as to any object of

and Inland Revenue Act, 1889, and as further amended by the Finance Act, 1894, reads as follows:—

"The real and personal or movable property to be included in an account shall be property of the following descriptions, viz.:—

"(a) Any property taken as a *donatio mortis causa* made by any person dying after the 1st day of August, 1894, or taken under a disposition, made by any person so dying, purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust, or otherwise, which shall not have been *bona fide* made twelve months before the death of the deceased, or property taken under any gift, whenever made, of which *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise.

"(c) Any property passing under any past or future settlement (including any trust, whether expressed in writing or otherwise), made by any person dying after such day, by deed or any other instrument not taking effect as a will, whereby an interest in such property, or the proceeds thereof, for life, or any other period determinable by reference to death, is reserved, either expressly or by implication, to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in, such property, or the proceeds of sale thereof."

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that power than his or her age of twenty-one years, or day of marriage), in such shares, if more than one, and upon such conditions, and in such manner as Sara E. G. Day should by deed or deeds, or by her last will, appoint, and, in default of such appointment, or so far as same should not extend, for all the children of Sara E. G. Day, who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry; and if only one child, then the whole to be in trust for that child. It was provided that, notwithstanding the preceding trust, it should be lawful for Sara E. G. Day, by her will, to appoint to her husband, Joseph Michael Day, during his life, a yearly sum not exceeding £300 payable out of the income of the £15,000. If there should be no child of Sara E. G. Day, whether by her present or any after-taken husband, who being a son, should attain the age of twenty-one years, or being a daughter should attain that age or marry under that age, the trustees should hold the trust funds after the death of Sara Elizabeth Graham Day (but subject to the payment to Joseph M. Day of any annuity appointed to him) in trust for Sir Henry Cochrane absolutely; the trustees should, during the life of Sara E. G. Day, hold the balance of the income of the £15,000 after payment of the yearly sum of £575, or the annuity to Joseph M. Day, upon trust for Sir Henry Cochrane absolutely.

The sum of £15,000 was, at the time of the execution of this indenture, invested on mortgage at 4½ per cent. per annum on properties of Lord Clanmorris known as the Cloughline estate and Summerhill estate, both in the county of Mayo, and by two indentures executed prior to, but of even date with, the indenture of trust, the mortgage debt of £15,000 and all securities therefor were, at the request of Sir Henry Cochrane, transferred to and vested in the trustees.

Ever since the execution of the indenture the trustees had been in *bona fide* possession of the £15,000, and had received yearly the interest from Lord Clanmorris, amounting to £675 per annum, and had paid in each year, up to the month of June, 1904, the sum of £575 to Sara E. G. Day, and £100, the balance of the income, to Sir Henry Cochrane.

Sir Henry Cochrane, on March 4, 1904, wrote to Sara E. G.

Day that he gave her a life interest in the balance of the income over £575, and shortly after he directed the trustees to pay in future the entire of the income on the £15,000 to Sara E. G. Day during her life, and the trustees accordingly had since paid to her the entire of the income.

Sir Henry Cochrane died on September 11, 1904, and probate of his will was, on November 1, 1904, duly granted to David Francis Moore, of 46 Kildare-street, Dublin, and James R. Coade, of Carlton, Sandford-road, Ranelagh, the executors.

The Commissioners of Inland Revenue claimed payment of estate duty at 7½ per cent., and settlement estate duty at 1 per cent., on the death of Sir Henry Cochrane on the entire £15,000, and the executors, who acted in the matter at the request of the trustees, were obliged to pay to the Commissioners £1268 15*s.* 4*d.*

The executors submitted that neither estate duty nor settlement estate duty was payable on the death of Sir Henry Cochrane on the interests in the sum of £15,000 given by the indenture of September 4, 1902, to Sara E. G. Day, her husband and children, that there was an absolute and complete gift of these interests respectively, and that in such interests Sir Henry Cochrane did not reserve to himself, either expressly or by implication, any interest whatsoever, or any right by the exercise of any power to restore to himself the absolute interest in those interests, or the proceeds of sale thereof, and that the interests were given *bona fide* more than twelve months before the death of Sir Henry Cochrane, and that possession and enjoyment of those interests were *bona fide* assumed and enjoyed by the trustees and Sara E. G. Day immediately on the execution of the indenture, and thenceforth retained to the entire exclusion of Sir Henry Cochrane, or of any benefit to him by contract or otherwise.

The executors admitted that estate duty was payable in respect of the interest, under the trust indenture of the late Sir Henry Cochrane, in the £15,000 contingent upon the decease of Sara E. G. Day without issue who would take interests; but they claimed that they were entitled, under section 7 (6) of the Finance Act, 1894, to defer payment of such estate duty until the contingent interest fell into possession. They further submitted that no settlement estate duty was payable in respect of this contingent

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interest, as it was not settled by the will or by the trust deed; nor did it pass under any disposition on the death of Sir Henry Cochrane to any person not competent to dispose of it.

The executors admitted that estate duty was payable in respect of the capital value of the life interest of Sara E. G. Day in the balance over and above the sum of £575 of the income of the £15,000 given to her by Sir Henry Cochrane within twelve months of his death; but submitted that settlement estate duty was not payable in respect thereof for the same reasons, as exemption was claimed for the contingent interest.

The Commissioners of Inland Revenue submitted that estate duty at the rate of 7½ per cent., and settlement estate duty at the rate of 1 per cent., were properly assessed by them on the death of Sir Henry Cochrane, in respect of the sum of £15,000 under the provisions of the Finance Act, 1894, sects. 1, 2 (1) (*c*), and 5 (1). They claimed that under the circumstances there was not an absolute and complete gift to Sara E. G. Day and her children and husband of the interest mentioned in the £15,000. Such interests were not given *bona fide* more than twelve months before the death of Sir Henry Cochrane; *bona fide* possession and enjoyment of the interests were not assumed by the trustees, or by Sara E. G. Day, immediately upon the execution of the trust deed, and thenceforward retained to the entire exclusion of Sir Henry Cochrane, or of any benefit to him by contract or otherwise, but an interest in the £15,000 for life, and for a period determinable by reference to death, was reserved by Sir Henry Cochrane.

The Commissioners, in the alternative, submitted that under the provisions of the Finance Act, 1894, estate duty and settlement estate duty, at the rates before mentioned, were payable in respect of the contingent interest of Sir Henry Cochrane in the £15,000, and in respect of the capital value of the life interest of Sara E. G. Day, in the balance over and above the sum of £575 of the income of the £15,000. The executors were not entitled to exercise the option of postponing payment under section 7 (6) of the Finance Act, 1894, of the duty payable in respect of the contingent interest of Sir Henry Cochrane in the £15,000.

Ronan, K.C. (with him *Herbert Wilson, K.C.*, and *Daniel Wilson*), for the petitioners :—

The important question here is, What was the subject-matter of the gift? If I cut an apple in two and give part of it to A, it is none the less an absolute gift of that part because I keep the other part myself. The intervention of a trustee makes no difference. If, instead of cutting the apple myself, I give it to B, tell him to cut it and give half to A, and keep the other half for me, it is equally an absolute gift of half to A. If I convey my property to trustees, and do not declare any trusts, there is no gift—it remains mine. If I declare trusts of the entire in favour of others, it is a gift of the entire to them. If I declare trusts of part only for others, it is a gift of that part to them—the rest remains mine. In each case the subject-matter of the gift is the part given. If I vest property in trustees in trust for A for life, there is a gift of the life interest—the *corpus* remains mine. If I further give the *corpus* to his children who attain twenty-one, it is a gift of the *corpus* in that event. In the event of there being no children, the *corpus* remains mine. It makes no difference that the deed of gift specifies the part not given, as well as the part given, and contains a trust for the donor of the former. This simply does what the law would have done without it. Its only effect is to distinguish more clearly what *is* given, and what *is not* given.

The deed of September 4, 1902, was a gift of part of the £15,000. The part given consists of the interests given to Mrs. Day, her husband and children. The part not given consists of the part retained by Sir Henry Cochrane. If the trusts in his favour were omitted from the deed, its operation would be the same. The subject-matter of the gift being the interest given—(*a*) it was made *bona fide* more than twelve months before his death; (*b*) *bona fide* possession was immediately assumed and retained to the entire exclusion of the donor; and (*c*) no benefit by contract or otherwise was retained by him out of the subject-matter of the gift. Therefore, no duty is payable in respect of the interests given to Mrs. Day, her husband and children, by the deed of 1902.

Estate duty would be payable in respect of the gift of the

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balance of the income of £15,000 to Mrs. Day, inasmuch as it was made within twelve months of the death of the donor, but no settlement estate duty would be payable in respect of it, as this balance was never settled.

[He referred to Lord Macnaghten's judgment in *Wheeler* v. *Humphreys* (1), to *The Attorney-General* v. *Grey* (2), and *The Attorney-General* v. *Holden* (3).]

The Solicitor-General (*Campbell, K.C.*) and *Coll* (with them *The Attorney-General, The Right Hon. J. Atkinson, K.C.*), for the Commissioners of Inland Revenue:—

The primary object of the settlor is recited on the face of the deed, viz.:—"In consideration of his natural love and affection for his said daughter, hereby irrevocably directs, and it is hereby agreed and declared, that the said trustees shall stand possessed of the sum of £15,000, hereinafter called the trust funds, and all interest to become due for same," &c.; that is a transfer of the £15,000 to the trustees. He retains two distinct interests in the property transferred, viz.: (1) £100 a year, and (2) the reversion contingent upon the decease of Sara E. G. Day without issue who would take interests under the deed. These are two interests reserved to the settlor in the property transferred. The quantum of interest reserved is immaterial—the expression in the section is "an interest," which means any interest, however small.

The analogy of the apple, used by Mr. Ronan, is not complete. To complete it, it is necessary to substitute an apple-tree for the apple. Suppose a man makes a gift of an apple-tree in these terms—"I give you this apple-tree, but you are to give me so many of the apples yielded annually as exceed 500." That is a gift of the whole apple-tree, and the right to the surplus is an interest reserved in the property transferred. Again, if a man says, "I give you this apple-tree with all the fruit it yields annually; but, if a certain event happens, it is to be mine again"; surely that, also, is a gift of the entire apple-tree with an interest reserved in the giver dependent upon the happening of a certain contingency. When Sir Henry Cochrane says, "I hand over this

(1) [1898] A. C. 506. (2) [1900] A. C. 124. (3) [1903] 1 K. B. 832.

£15,000 to trustees; they are to pay £575 a year to Mrs. Day during her life; and, if the income exceeds £575 a year, I am to get the balance"; surely that is a gift of the £15,000, subject to the interest reserved. The £15,000 is to be Mrs. Day's security during her life for the payment of her £575 a year; and if the £15,000 is sufficiently fruitful to supply more, the balance is to go to her father, the settlor. Where the whole fund is to be the security, it is impossible to divide the fund in the manner suggested by the petitioners. Neither is it possible to divide the fund as suggested, when the whole fund is to be the security for the annual payment to Mrs. Day until the happening of the contingency specified.

It is true that, since the passing of the Finance Act, 1894, the practice of the Inland Revenue authorities has been not to claim duty under circumstances such as the present. That does not affect the question of law which this Court has to decide upon the construction of the Act.

Herbert Wilson, K.C., in reply.

[The following additional cases were referred to during the arguments:—*The Attorney-General* v. *Worrall* (1); *The Attorney-General* v. *Beech* (2).]

Cur. adv. vult.

June 29.

PALLES, C.B.:—

The argument for the Crown is that the entire interest in the £15,000 falls within the description of property comprised in clauses (*a*) and (*c*) of the Customs and Inland Revenue Act, 1881, as amended by sect. 11 of the Customs and Inland Revenue Act, 1889, and the Finance Act, 1894, sect. 2, clause (*c*). These clauses are as follow:—

> "(a) . . . Property taken under any *gift*, whenever made, of which *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the *gift*, and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise."
>
> "(c) Any property passing under any . . . settlement . . . made by any person . . . by deed or any other instrument not taking effect as a

(1) [1895] 1 Q. B. 99. (2) [1899] A. C. 53.

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will, whereby an interest in such property, or the proceeds of sale thereof, for life, or any other period determinable by reference to death, is reserved either expressly or by implication to the settlor."

The words "life" and "death" in clause (*c*) plainly mean the "life" and "death," respectively, of the settlor. As, then, even if the interests in the trust funds which remained in Sir Henry Cochrane after the execution of the deed of the 4th September, 1902, are to be deemed to have been "reserved" to him within the meaning of clause (*c*), as the interests so reserved do not include an interest for *the life of Sir Henry Cochrane*, or for "any other period determinable by reference to *his* death," the case is not within clause (*c*) of the above section.

Thus, the real question is, Is it within clause (*a*)? Is it "*property* taken under any *gift*, . . . of which *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the *gift*, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise"?

The Crown contend that this question should be answered in the affirmative: because they say that two interests in the £15,000, the subject of the deed, were reserved to Sir Henry Cochrane by that deed, each of which was an interest in him, which prevented the possession and enjoyment under that deed being one "to the entire exclusion of the settlor, or of any benefit to him."

Those two interests are—1st, the ultimate trust for Sir Henry Cochrane, in the event specified in the settlement, of the entire *corpus* of the fund after the death of Mrs. Day, but subject to an annuity which may be appointed to her husband by her will under the power in the settlement; 2nd, the trust for Sir Henry Cochrane of the surplus of the income of the £15,000 during the life of Mrs. Day which shall remain after payment thereout of the £575 a year thereby provided for her.

This contention assumes that the subject-matter of the "gift" effected by the settlement is the entire equitable interest in the £15,000, and upon that assumption I think the contention would be correct. This assumption, however, is contested by the appellant; and, therefore, whether it is, or is not, correct in law is the question for us.

In determining it, I desire to consider separately the effect of each of these two separate trusts or interests.

Proceeding, then, to determine the effect of the first, I eliminate the second from consideration. This reduces the question to one which must be of every-day occurrence. In the case of a voluntary settlement, executed upwards of twelve months before the settlor's death, whereby personalty is vested in trustees, upon trust to pay the interest to a son for life, and after his death in trust, as to the capital, for such of his children as shall answer a particular description, with an ultimate trust for the settlor in the event of none of the children of the son becoming entitled under the prior trusts, is the capital value of the entire trust fund liable to estate duty, although *bona fide* possession and enjoyment of the property has been assumed and retained by the trustees? If it be liable, the liability would arise from the frame of the deed, and the subsequent possession and enjoyment under it, and it could not be defeated by subsequent events, such as there having been, prior to the death of the settlor, objects of the trusts who had taken vested interests in the entire capital, so that at the settlor's death it was impossible that he could take any benefit under the trust.

We are told by the Solicitor-General that the practice of the Inland Revenue authorities (during the ten years which have elapsed since the passing of the Finance Act) has been to hold that this duty is not payable under the circumstances which I have mentioned. He says, however, that which is undoubtedly true, that this practice, which he insists is contrary to law, cannot affect the construction of the Act. I agree. We have held, in *The Attorney-General* v. *Robinson* (1), that an erroneous practice of those authorities, for a much longer period, *viz.*, from 1881 to 1900, could not have that result. But the practice is sufficient, in the one case, as it was in the other, to require us to very carefully examine the statute on which it is founded before we condemn it. Further, I venture to say that upon such a question as the present, not confined (as was that in *The Attorney-General* v. *Robinson* (1)) to Ireland alone, not limited,

(1) [1901] 2 I. R. 67.

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as was that practice, to the comparatively trivial interests of tenants under the Land Act of 1881, but applying to the entire of the United Kingdom, and involving estate duty to an immense amount; knowing, as the reports show us, the contentions under the Finance Act which the Inland Revenue authorities have from time to time thought fit to bring to the ultimate arbitrament of the House of Lords, I cannot help thinking that the practice impeached by the learned Solicitor-General has the sanction of the distinguished men who, for the last ten years, have been the law officers of the Crown. However, notwithstanding all this, I have felt myself bound to give the question an independent consideration; and having done so, I am perfectly satisfied that the practice was in all respects correct.

The question turns upon the meaning of the word "gift" in the statute. In such a case as the present, is the subject-matter of the gift the entire interest in the capital sum, or is it only the beneficial interest of which the settlor is, or may be, divested by the dispositions? Indeed, the case may be stated more simply, because, as if the settlement had not contained the ultimate trust, there would have been a resulting trust to the donor, to the extent to which the trusts expressed in the deed did not exhaust the entire equitable interest in the fund, and as the settlor might have effected the same result (without any transfer of the legal interest in the trust moneys) by constituting himself a trustee thereof, the question may be reduced to this, which I regard as its simplest form: if one possessed of a sum of money, say, £15,000, by a voluntary instrument (so framed as to constitute a binding trust) executed shortly after the marriage of a son, but upwards of twelve months before his own death, declared that he would hold the same upon trust to invest and to pay the annual income to his son for life, and upon his death in trust for such of that son's children as would answer a particular description, would estate duty be payable upon the death of that settlor upon the entire capital sum, although the interest had been duly paid to the son by the father until the death of the latter? In such a case, what would have been the gift? The legal interest did not pass; therefore the subject-matter of the gift could not be measured by reference to that interest. The only equitable interest which

was capable of passing consisted of the interests provided for the son and his children. The residue of the equitable interest remained in the settlor. It did not pass, it never moved. In what conceivable sense can it be said that it was given? Surely it is wasting language to say more than, in the pithy words of Lord Macnaghten (1), "The interest which the father retained or reserved was not given," and if it was not given, it was not included in the gift; and if it was not included in the gift, there was "an entire exclusion of the donor" from the property taken under the disposition by way of gift"; and if, as here, the possession and enjoyment was, immediately upon the gift, assumed by the persons entitled under the disposition to assume it, and was thenceforward retained in accordance with such gift, as there is no pretence of any benefit being provided for the settlor, by contract or otherwise, out of the subject-matter of the gift, the property included in the gift would not be subject to estate duty. And if it would not be so liable in the case I have put, as in these questions of revenue, matters of mere conveyancing form are immaterial; as we are to view the substance only of the transaction, and as "gift" in the context means "beneficial gift," so, too, in the actual case before us, should it be held that the reservation of the ultimate trust to Sir Henry Cochrane cannot, *per se* and irrespective of the trust of the surplus of the income during Mrs. Day's life after payment of her £575 a year, render the entire capital subject to duty.

So much for the effect of the ultimate trust for Sir Henry Cochrane. I now take the trust of the surplus income during Mrs. Day's life. The identical reasoning which I have applied to the ultimate trust is equally conclusive as to this. What was given to Mrs. Day was not the entire income during her life. It was no more than £575 a year, parcel of that income. The beneficial interest in the surplus above that sum did not pass. It remained in Sir Henry Cochrane. It was not given. Possession and enjoyment of the subject-matter of the actual gift was assumed by Mrs. Day immediately on the gift, in the only way in which such a subject-matter was capable of being possessed and enjoyed, *viz.*, by the receipt of the yearly sum to which she thereby became

(1) [1898] A. C. 508.

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entitled; and she has thenceforth retained it, to the entire exclusion of Sir Henry Cochrane, by continuing in such receipt. The receipt by Sir Henry of the surplus of the yearly income, above the £575, to which Mrs. Day was entitled, was not a participation in the gift. That surplus was something altogether outside the gift. It follows that there was not any reservation of any benefit to the settlor *out of the gift*. The deed does not contain any collateral covenant; nor is it pretended that there was any collateral agreement outside the deed under which he could have received a benefit. Therefore *The Attorney-General* v. *Worrall* (1) does not apply, and the case is not brought within the clause.

Much reliance has been placed by the Crown upon *The Attorney-General* v. *Lord Grey* (2). There the circumstances were wholly different. There was not an exclusion of the settlor from benefits *out of the gift*, for his future debts were to be paid out of it. There was also a conditional power of revocation, which was held to be a benefit out of the gift, and £4000 a year was reserved to him for life. The limitation of this annuity, although prior to the gift, was, as well as being charged on the land, secured by the personal covenant of the grantee, and this covenant, according to *The Attorney-General* v. *Worrall* (1), made its subject-matter a reservation out of the gift within the meaning of clause (*a*); and, therefore, even if Lord Halsbury's words, "The settlement itself has reserved £4000 a year," mean, as they probably do, "reserved *out of the gift*," they are in no sense contrary to our present decision. The law made it a reservation *out of the gift* by reason of the existence of the personal covenant.

It follows that neither "estate duty," nor "settlement estate duty," is payable in respect of the benefits conferred upon Mrs. Day, her issue, or her husband.

Estate duty, but not settlement estate duty, is payable in respect of the expectancy of Sir Henry Cochrane in the £15,000 in the event of there being a failure of children entitled to take under the trusts; but the executors are entitled, under section 7, sub-sect. 6, to postpone payment of this latter duty until the interest falls into possession.

(1) [1895] 1 Q. B. 99. (2) [1900] A. C. 124.

Estate duty, but not settlement estate duty, is also payable in respect of the principal value of the interest, during the life of Mrs. Day, of the surplus of the interest on the £15,000 above the £575 a year, which surplus remained the property of Sir Henry Cochrane, notwithstanding the deed. The duty of ascertaining the latter amount lies on the Commissioners, and not on this Court.

In result, then, there must be a declaration to the effect I have stated, and the petition must stand over until the first day of next sittings to enable the Commissioners to ascertain the amount. The surplus of the duty already paid, over the sum which shall be so ascertained, must be repaid to the petitioners by the Commissioners with interest at 3 per cent., and the costs of the suit.

JOHNSON, J.:—

I entirely agree. In this class of case it has been uniformly decided that the Court must determine the real nature of the transaction, apart from legal phraseology, or forms of conveyancing. We must also bear in mind that "a gift is a gift, whether it be given directly or given through the medium of a trust. What the donor keeps back is no gift": Lord Macnaghten, in *Wheeler* v. *Humphreys* (1). The application of these two principles appears to me to solve the questions for decision in the present case. The Commissioners of Inland Revenue claim, under the Finance Act, 1894, section 1, section 2, sub-sect. 1 (*c*), and section 5 (1), estate duty and settlement estate duty on the death of the late Sir H. Cochrane in respect of a mortgage debt of £15,000 and interest, the trusts of which were declared by indenture of the 4th September, 1902, and Sir Henry's letter to the trustees, 4th March, 1904. Section 1 of the Act imposes estate duty, "save as hereinafter expressly provided," on "the principal value of all *property* real or personal, settled or not settled, which passes on the death" of any person dying after 1st August, 1894.

Section 2 provides, sub-sect. 1, that "property passing on the death of the deceased shall be deemed to include" (*inter alia*)

(1) [1898] A. C. 506, 509.

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sub-clause (*c*) "property taken":—(1) "under a disposition purporting to operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust, or otherwise, which shall not have been *bona fide* made twelve months before the death of the deceased"; and (2) "under any gift whenever made, of which" (property) "*bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise."

Before and at the time of the execution of the indenture of the 4th September, 1902, the mortgage debt of £15,000, with interest thereon at 4½ per cent., and the securities therefor, were vested in trustees for Sir Henry Cochrane absolutely, the interest amounting to £675 yearly. This indenture recites that Sir Henry Cochrane being desirous of making some provision for his daughter, Mrs. Day, had caused this mortgage debt, and the securities therefor, to be transferred to trustees, to be held by them on the trusts thereinafter declared. These trustees were also parties to, and executed, the indenture, and thus immediately accepted the trusts declared by the indenture, being then in actual possession as such trustees of the mortgage debt of £15,000, and interest, and the securities therefor. The indenture then witnessed that Sir Henry Cochrane, in consideration of his love and affection for his said daughter, thereby irrevocably directed that the trustees should stand possessed of the £15,000, and all interest to become due for the same, and the benefit of all securities for the same, in trust, out of the income thereof, to pay £575 yearly to Mrs. Day during her life for her separate use without power of anticipation, and after her death, in trust as to the £15,000 for her child, children, or remoter issue, as she should appoint, and in default of appointment, in trust for all her children, who being sons should attain twenty-one years of age, or daughters should attain that age or marry; and if but one such child, in trust for that child. Power was also given to her to appoint to her husband for life a sum not exceeding £300 yearly out of the income of the £15,000. The indenture also provided for varying the investments of the trust funds. Sir Henry Cochrane, the donor in the present case, having thus made these gifts out of the interest and principal of

the mortgage money, by way of declaration of trust for Mrs. Day and her children, respectively, then proceeds by the same indenture to declare the trusts of so much of the mortgage (principal and interest) as he had not parted with, of which he had made no gifts, and which remained beneficially vested in him as of his former and continuing estate, viz., (*a*) the surplus income of the £15,000, after payment of the yearly sum of £575 to Mrs. Day during her life; and (*b*) the contingent interest in the £15,000 expectant on the failure or termination of his gift for the children of Mrs. Day; and he declares the trusts of this property (*a*) and (*b*) (of which he had made no gift) for himself absolutely. The declaration of these trusts of the surplus income of the £15,000, and of the ultimate contingent interest in the principal sum of £15,000, is nothing more than a conveyancing form expressing the trusts of his property which he kept back and did not part with in his gifts, and which, if not so expressed, the law would have supplied.

The real nature of the transaction is apparent on the face of it. Sir Henry Cochrane desired to provide immediately, absolutely, and irrevocably, for his married daughter by means of the mortgage vested in trustees for himself, and without reserving or otherwise in any way obtaining any benefit or advantage whatever directly or indirectly, collateral or direct, to or for himself. This desire he effectuates by giving his daughter, during her life, by way of declaration of trust, £575 yearly, out of the income of the principal mortgage money, £15,000—the surplus of that income over and above £575, he does not part with—and by giving her children the principal mortgage money, either by her appointment or in default of appointment, on attaining age or marrying. The contingent interest on the principal mortgage money expectant on failure or termination of his trust gifts in the event of no child attaining a vested interest, he does not part with. His intention then is thus accomplished. By the execution of the indenture of 4th September, 1902, he immediately divests himself absolutely, entirely, and irrevocably of his property the subject of his gifts, which is thenceforth to be, and has been, *bona fide* retained by his donees to the entire exclusion of himself, or any benefit to him by contract or otherwise. From the time of the execution of the

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indenture, 4th September, 1902, the trustees paid Mrs. Day, who is still living, £575 out of the income of the £15,000, and paid Sir Henry Cochrane the surplus of that income, until they received his letter of the 4th March, 1904, directing them to pay, and they have accordingly since paid, the entire of the income to Mrs. Day; and from the execution of the indenture of 4th September, 1902, the trustees according to their trusts have held the principal sum of £15,000 on the trusts declared for the children of Mrs. Day and by the gift made by Sir Henry Cochrane for them; but the contingent interest on that sum expectant on the failure or termination of his gift, in the event of no child attaining a vested interest, and which was no part of the gift, the trustees hold for Sir Henry Cochrane absolutely.

Sir Henry Cochrane died within twelve months next after his letter of the 4th March, 1904, and, therefore, the surplus income of the mortgage (over and above the £575) which is dealt with by that letter is, by the Finance Act, 1894, sect. 2 (1) (c), to be deemed to have passed on the death of him, the donor, and estate duty is payable on the capitalised value of that surplus; and estate duty is also payable on the capitalised value of Sir Henry Cochrane's contingent ultimate interest in the £15,000 which passed on his death, but by sect. 7 (6) of the Act his executors have the option to defer payment of the duty until the expectancy falls into possession. I think no other duties are in this case payable under the Finance Act, 1894.

KENNY, J. :—

The main contention on the part of the Crown is that the whole £15,000 must bear estate duty, on the ground that an interest is alleged to have been reserved to the donor which subjects the property to the provisions of section 38, sub-sect. 2, of the Act of 1881, as amplified by the Act of 1889. To bring it within these Acts, an interest in the property for life or any other period determinable by reference to death must be reserved either expressly or by implication to the settlor, or it must be shown that *bona fide* possession and enjoyment of the property was not assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor or of any benefit to him by con-

tract or otherwise. It is plain to me that there is no life interest here reserved to the donor, nor any interest for a period determinable by reference to death. What was reserved to the donor was an income from the £15,000 during Mrs. Day's life over and above the yearly sum of £575. That is not an interest for the donor's life, nor for a period determinable by reference to his death. If Mrs. Day had died during her father's lifetime, leaving issue, the reservation of the surplus income to Sir Henry Cochrane would have determined. Does it then come under the Act of 1889? I am clearly of opinion that *bona fide* possession and enjoyment of the income to which Mrs. Day was entitled was at once assumed by her through the trustees of the deed; and the only question that presents itself as a serious one to my mind is, whether that possession is to the entire exclusion of the donor or of any benefit to him in the property. In a possible state of circumstances he would take no benefit whatever, namely, if the £15,000 was invested in some security yielding only $3\frac{1}{3}$ or $3\frac{3}{4}$ per cent., while if it was invested at a higher rate, he would unquestionably take a benefit. Is such a contingent benefit as this within the section? It is not like a charge issuing out of the whole property, and it is one which might be segregated by the setting apart by the trustees during Mrs. Day's life of a portion of the principal sufficient to produce the amount of surplus income. If the donor himself had adopted that arrangement, I would have felt no difficulty whatever in the case; but looking, as we are bound to do, at the real nature and substance of the transaction, and the character and quantum of the gift, I think that the £15,000 can be regarded as severable into parts, and that the part which would realise £575 for the donee, Mrs. Day, is the subject-matter of the donor's gift, and is the "property" which is held for her, and that it is so held to the entire exclusion of the donor or of any benefit to him.

As to the effect of the reservation of the ultimate reversion to the donor, I can add nothing to the judgment of the Lord Chief Baron.

Solicitor for petitioners: *Sir Benjamin Whitney.*
Solicitor for the Crown: *The Solicitor of Inland Revenue.*

J. L.

K. B. Div. 1905. Oct. 26, 27.

THE KING (M'MONAGLE) *v.* THE CHAIRMAN AND JUSTICES OF COUNTY DONEGAL (1).

Justices—Summary jurisdiction—Appeal to Quarter Sessions—No appearance on behalf of appellant—Appeal struck out—Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), s. 24.

M., having been convicted by the justices at Petty Sessions, served notice of appeal to Quarter Sessions, entered into the usual recognizance to prosecute the appeal, and gave notice to the opposite party of his intention to prosecute it, as provided by section 24 of the Petty Sessions (Ireland) Act, 1851. When the appeal was called on, there was no appearance on behalf of M., and the Court of Quarter Sessions ordered the appeal to be struck out:—

Held, that this was the proper course to adopt.

MANDAMUS.

The prosecutor was charged on summons before the Justices at Stranorlar Petty Sessions with the detention of certain books and documents, the property of the Finn Valley Co-operative Agricultural and Dairy Society, Limited. He was convicted and ordered to pay a fine of £2 2*s*., and deliver up the books and documents, and in default to be imprisoned for two months. The prosecutor duly served notice of appeal to the Quarter Sessions, and entered into the usual recognizance to prosecute the appeal. A question arose as to whether the notice of intention to prosecute the appeal, required by sect. 24, clause 5, of the Petty Sessions (Ireland) Act, 1851, had been served in time. For the purpose of the present report, however, it may be assumed to have been duly served. When the appeal was called on at Quarter Sessions, held at Lifford, neither the appellant nor his solicitor was present. The clerk of the solicitor for the appellant asked for a postponement in order that the solicitor, who was stated to be then engaged at Quarter Sessions at Strabane, might be present. The respondents' solicitor asked to have the appeal struck out, which was done.

(1) Before LORD O'BRIEN, L.C.J., and MADDEN and WRIGHT, JJ.

The material portion of the order made at Quarter Sessions, as set out in the certificate of the Clerk of the Peace, was as follows :— "And the said appeal coming on to be heard this day in presence of the solicitor for complainants, and there being no appearance for the appellant, the said appeal was struck out."

The prosecutor obtained a conditional order for a writ of mandamus directing the chairman and justices to hear and determine the appeal; and cause having been shown by the Finn Valley Co-operative Agricultural and Dairy Society, the present application was on behalf of the prosecutor to make the order absolute notwithstanding cause.

P. S. Walsh, for the prosecutor :—

Under clause 6 of sect. 24 of the Petty Sessions (Ireland) Act, 1851, when the notice required by clause 5 has been given, the only jurisdiction of the Court of Quarter Sessions is to confirm, vary, or reverse, the order appealed from; there is no jurisdiction to strike out the appeal. The provisions in the latter part of clause 6, as to the procedure to be adopted when the appeal is not duly prosecuted, do not apply once the notice under clause 5 has been given; such notice amounts to a sufficient prosecution. The order itself states that the appeal came on for hearing.

P. Law Smith, for the Finn Valley Co-operative Agricultural and Dairy Society, Limited :—

The notice under clause 5 of sect. 24 is notice of "intention to" prosecute. Even assuming, therefore, that the notice was in the present case served in time, this does not by itself amount to a due prosecution of the appeal. The default of appearance on behalf of the appellant at the Quarter Sessions is equivalent to a non-prosecution, and the proper course to adopt, therefore, was to strike out the appeal.

LORD O'BRIEN, L.C.J. :— Oct. 27.

The facts upon which the question we have to determine arises are shortly as follows:—The prosecutor, M'Monagle, was charged on summons before the magistrates at Petty Sessions with the detention of certain books and documents, the property of the

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Finn Valley Co-operative Agricultural and Dairy Society. He was fined £2 2*s.*, and ordered to deliver up the books and documents, or in default to be imprisoned for two months. The prosecutor duly served notice of appeal, and entered into the usual recognizance. A question arises as to whether the notice of intention to prosecute the appeal required by section 24, clause 5, of the Petty Sessions Act was served in time. I should be inclined myself to think that it was not; but, for the purpose of the present judgment, I shall assume it to have been properly served. When the case was called at Quarter Sessions neither M'Monagle nor his solicitor appeared (the solicitor, it was stated, being engaged elsewhere), and an order was made by the Court of Quarter Sessions striking out the appeal. It is now contended by Mr. Walsh that this order was wrong; that under section 24 of the Petty Sessions Act the Court of Quarter Sessions should have confirmed the order made below, and that not having done so continuances should be entered so that the appeal may be properly disposed of. That is to say, the argument is that in an appeal of this kind, which is essentially a re-hearing, the Court of Quarter Sessions is, without a re-hearing, to confirm the order and send the defendant to gaol. I am of opinion that, on the proper construction of section 24 of the Petty Sessions Act, this contention cannot be maintained. By clause 1 of that section the appellant must serve notice in writing of his intention to appeal upon the Clerk of Petty Sessions within three days from the date of the order appealed from; and by clause 2 he must, within three days after such notice, enter into a recognizance "conditioned to prosecute such appeal." By clause 5 the appellant is to give notice in writing to the opposite party of his intention *to prosecute* his appeal seven clear days before the commencement of the Sessions to which the appeal is to be made. Clause 6 provides that "whenever an appeal *shall have been so made*," that is, made according to the provisions prescribed by the previous clauses, "and such last-mentioned notice shall have been duly given, it shall be lawful for the said Court of Quarter Sessions . . . to entertain the same, and to confirm, vary, or reverse the order made by the justices." How can the Court "entertain" the appeal unless the appellant, or some one representing him, is there to bring the facts before the Court, and

to say, "I am here to prosecute the appeal"? If there is no one there to prosecute, the Court cannot entertain the appeal, and the entertaining the appeal is a condition precedent to confirming, varying, or reversing it. If no one attends to prosecute the appeal, clause 6 proceeds to point out the course to be pursued: "And whenever any such appeal shall not have been duly prosecuted, the Clerk of the Peace . . . shall so certify upon such recognizance and return the same to the justices of the Petty Sessions from which the same shall have been transmitted . . . within seven days after the termination of the Sessions at which such appeal ought to have been prosecuted." That is to say, in such case the Court does not entertain the appeal; no order is made confirming, varying, or reversing the order below, but the recognizance is returned with a certificate by the proper officer that the appeal has not been prosecuted.

We are all of opinion that the argument put forward on behalf of the prosecutor is not sustainable, and we discharge the conditional order with costs.

MADDEN and WRIGHT, JJ., concurred.

Solicitor for the prosecutor: *P. Gallagher.*

Solicitor for the Finn Valley Co-operative Agricultural and Dairy Society, Limited: *John Elliott.*

J. G. T.

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May 3, 4, 5, 16.

THE KING (EWING) *v.* THE JUSTICES OF COUNTY DOWN (1).

Public health—Nuisance—Order of justices for abatement—What constitutes order—Signature of order—Justices—Summary jurisdiction—Public Health (Ireland) Act, 1878 (41 & 42 *Vict. c.* 52), *ss.* 249, 279, *Sched. C, Form C—Petty Sessions (Ireland) Act*, 1851 (14 & 15 *Vict. c.* 93), *ss.* 21, 36.

Where justices make an order for the abatement of a nuisance, under sect. 112 of the Public Health (Ireland) Act, 1878, the order of the justices is not the entry in the order book, but the document drawn up in accordance with Form C in Schedule C of the Act. If the order so drawn up is good in form, its validity is not affected by the fact that the entry in the order book would be bad on its face as an order.

Quaere: Where such order is made by more than two justices, must all sign the order, or is signature by two sufficient?

CERTIORARI. The Rural District Council of Castlereagh, the sanitary authority of the district, served on the prosecutor a notice under section 110 of the Public Health (Ireland) Act, 1878, requiring him to abate a nuisance alleged to arise from his slaughterhouse being in an unsanitary condition, and for that purpose to execute certain works specified in the notice. This notice not having been complied with, a summons was issued by the district council against the prosecutor. The summons alleged that a nuisance existed by reason of the prosecutor's slaughterhouse being in an unsanitary condition from the want of the requirements set forth in the notice, and that the nuisance was caused by the act or default of the owner of the premises. The summons came on for hearing before the justices at Petty Sessions on the 7th January, 1905, when an order was made for the abatement by the prosecutor of the nuisance complained of. Five magistrates took part in the adjudication, as appeared by the entry in the Petty Sessions order book. The order was stated in an affidavit filed by the prosecutor to have been made by a

(1) Before LORD O'BRIEN, L.C.J., and ANDREWS and GIBSON, JJ.

majority of one. An entry was thereupon made in the order book purporting to be an entry of the order of the justices, and a certificate of the same in the form (I a) given in the Schedule to 14 & 15 Vict. c. 93, was subsequently given to the prosecutor by the clerk of Petty Sessions, certifying that, on the hearing of a complaint, &c., "an order was made on the 7th day of January, 1905, by the justices present against James Ewing, of Ballymaconaghy, to the following effect, viz. :—The Court is of opinion that a nuisance exists, and directs that the defendant abate the nuisance, and for that purpose comply with the requirements of the notice that was served upon him upon the 21st December, 1904, within the period of one month from the date of the serving upon the defendant of a copy of this order. The defendant is further ordered to pay costs, two pounds and two shillings. In default of the payment of the above sum, such sum is to be recovered by distress and sale of the goods of the defendant."

The prosecutor, treating this as the order of the justices, applied for and obtained a conditional order for a writ of *certiorari* to remove, for the purpose of being quashed, all orders and adjudications of the justices made on the 7th January, 1905, on the hearing of the complaint, on the grounds "That all and singular orders and adjudications in the premises were made without and in excess of jurisdiction. That the said order is bad on its face, inasmuch as (*a*) it is not in accordance with the section of the Act of Parliament; (*b*) that there is no finding by the justices that the nuisance was caused by the act, default, or sufferance of the defendant; (*c*) the order does not specify in accordance with the section the necessary works for abatement. That the said order is bad, inasmuch as (*a*) the justices had no jurisdiction to order the payment of costs as therein contained; (*b*) there was no jurisdiction to direct that the costs should be recovered by distress and sale of defendant's goods in default of payment thereof."

From an affidavit filed by way of cause against the conditional order it appeared that, on the hearing of the summons, an order was made by the magistrates in strict accordance with Form C in Schedule C of the Public Health (Ireland) Act, 1878, and that a copy of this order was served on the prosecutor. This order was signed by two only of the justices who adjudicated.

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THE KING (EWING) v. JUSTICES OF DOWN.

W. Martin Magrath, K.C. (with him *Hanna*), for the prosecutor:—

The order of the justices is bad on the grounds set out in the conditional order. We admit that if the document drawn up according to Form C in Schedule C of the Public Health (Ireland) Act, 1878, is to be considered as the order, it is good. We contend, however, that the order of the justices is not this document, but is the entry in the order book, as appearing by the certificate. By section 249 of the Public Health (Ireland) Act, 1878, all offences under the Act are to be prosecuted according to the Summary Jurisdiction Acts, and, by section 2, the expression Court of Summary Jurisdiction is defined to mean any justice or justices of the peace to whom jurisdiction is given by the Summary Jurisdiction Acts or any Acts therein referred to, and the Summary Jurisdiction Acts are defined to mean, as regards places outside the police district of Dublin metropolis, the Petty Sessions (Ireland) Act, 1851, and the Acts amending or affecting the same. The procedure, therefore, in the present case is regulated by the Petty Sessions Act, 1851, section 21, clause 1 of which provides that the entry in the order book when signed by one of the justices is to be deemed to all intents and purposes a conviction or order as the case may be. If such entry is not the order in the present case, there would be no record of the order made. [GIBSON, J., referred to *The Queen* (*Murphy*) v. *Justices of Wexford* (1) and *The Queen* (*Lyster*) v. *Justices of Queen's County* (2).] The order in *Murphy's Case* (1) was one made under section 162 of the Grand Jury Act, 6 & 7 Wm. 4, c. 116, the procedure under which is not regulated by the Petty Sessions Act, 1851, which was passed long subsequently. An order under that section is not an order of a court of summary jurisdiction; it could be made by a justice sitting in his study. *Lyster's Case* (2) was a decision upon section 24 of the Petty Sessions Act, which deals with appeals.

Thomas Harrison, for the Rural District Council of Castlereagh:—

I contend that the document in Form C is the order. The

(1) [1894] 2 I. R. 81. (2) [1901] 2 I. R. 132, note.

Public Health (Ireland) Act, 1878, contains a special code, complete in itself, dealing with the abatement of nuisances. The machinery of the Petty Sessions Act is no doubt used for the purpose of obtaining the order for abatement, "as a convenient mode of bringing the parties into Court," to adopt the words of Lord O'Brien, L.C.J., in *The Queen (Murphy)* v. *Justices of Wexford* (1); but the order itself is made under the Public Health Act. By section 279 of that Act the schedules are to have effect as part of the Act, and the form of order to be made by the justices is given in Schedule C, Form C. That form provides for the service "of this order, or a true copy thereof." This shows that the order contemplated is one of a nature capable of itself being served. If the order is the entry in the order book, how could it be served?

Hanna, in reply:—

The offence is to be prosecuted under the Petty Sessions Act, 1851. A prosecution begins with the complaint and does not end until an order is made. Section 36 of the Petty Sessions Act expressly provides that the forms in the schedule to that Act or forms to the like effect are to be the proper forms to be used "even in cases in which other and different special forms shall be or shall have been provided by the particular Act or Acts under which the information or complaint shall be made." Section 37 provides that the decision of the justices may be termed their order. That decision is embodied in the entry in the order book. In the present case the decision so entered was evidently treated as the order of the justices. It directs the requirements to be complied with within a month "from the date of the serving upon the defendant of a copy of this order"; and when the prosecutor applied for a copy of the order made, he was furnished with a certificate of this entry. As to the argument founded on the words in Form C referring to service of the order, it is to be observed that the Act itself contains no provision as to such service. Service of the order is only necessary where something is ordered to be done within a certain time after service. When the justices direct certain work to be done, they may direct it to be done either within a certain time from the date of the order, or a certain time from the service

(1) [1894] 2 I. R. 81.

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of the order. In the latter case only would service be necessary. Suppose, instead of requiring certain works to be executed, the justices had imposed a fine, could it be contended that service of the order was necessary? Loose words in a schedule are not to be taken as repeating the positive direction of a preceding Act: *Allen* v. *Flicker*, per Patteson, J. (1).

Even assuming that the document in Form C is to be considered as the order, it is bad. It is signed by only two justices out of the five who took part in the adjudication.

Cur. adv. vult.

May 16.

LORD O'BRIEN, L.C.J.:—

This case may be disposed of in a few sentences. The question which we have to determine arose in this way. The applicant, Ewing, the prosecutor in these *certiorari* proceedings, was prosecuted under the provisions of the Public Health Act for having a nuisance on his premises, and for not abating it and taking certain steps prescribed by the Castlereagh Rural District Council to prevent its recurring. The case was heard before certain magistrates sitting at Petty Sessions at Newtownbreda. An entry purporting to represent what was done was entered in the Petty Sessions book, and a document *dehors* the Petty Sessions book was drawn up in precise accordance with Form C in Schedule C of the Public Health Act, and was issued and served upon Mr. Ewing. There are two assumptions made:—1st, that if the entry in the Petty Sessions book is the order, it is bad, and must be quashed; 2ndly, that if the document drawn up in accordance with Form C was in fact the order, then a valid order was made which cannot be quashed. I am of opinion that the entry in the Petty Sessions book was not the order, and that the true original order was the document drawn up and served in accordance with Form C. The case, in my opinion, depends upon two sections of the Public Health Act, the 279th and 249th sections. The former section provides that the schedules to the Act shall be read and have effect as part of the Act, and that the forms contained in Schedule C to the Act, or forms to the like effect, varied as circumstances may require, may be used, and shall be

(1) 10 A. & E. 640, at p. 642.

sufficient for all purposes. Now amongst other forms there is the Form C, which purports to be a form of an order, and it is only requisite to read the form to see that the document drawn up in this form, *ipsissimis verbis*, is the true original order. Everything necessary to give jurisdiction is recited in it. What is necessary to be done is to be specified in it, and it expressly, by its language, draws a distinction between the original order and a copy of it, and between the summons and a copy. First it recites "whereas a true copy of a summons requiring, &c., hath been duly served according to the said Act," thus drawing a distinction between the original summons and a copy; and then, when it deals with the service of the order, it provides as follows:—"We in pursuance of the said Act do order the said . . . . within" (specifying the time) "from the service of this order or a copy thereof according to the said Act," to execute the works required. That is to say, the order as appearing in Form C is to be served, or a copy of it. It is plain the original order can be served, and certainly it is not contemplated that if the original order was in the Petty Sessions book, that that can be served. The provision that an alternative course may be pursued as to service of the copy or of the order, and the order being styled "this order," shows that what is drawn up in accordance with Form C is the original order. This is undoubtedly so in England. This is what is contemplated by the English Act, which is expressed, so far as this part of the argument is concerned, in precisely the same language—*totidem verbis*. The same words must in both countries have the same interpretation; and were it not for the 249th section of the Public Health (Ireland) Act, 1878, there would, in my opinion, be no difficulty in the case. That section provides that all offences under the Act, and all penalties, &c., under the Act directed to be recovered in a summary manner, may be prosecuted and recovered in manner directed by the Summary Jurisdiction Acts before a court of summary jurisdiction. That, however, in my judgment, deals only with the form of the prosecution, and means that the party is to be brought before the magistrates by summons. It does not at all follow that the order is to be drawn up in accordance with the provisions of the Petty Sessions Act. When the justices come to make the order, it is to be drawn up in the form provided by the Public Health

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Act. I do not think, therefore, that there is any inconsistency between the 249th section and the 279th section of the Public Health Act.

Mr. Hanna, in his excellent argument, referred to the 36th section of the Petty Sessions Act, which enacts that the forms in the schedule to that Act are to be the proper forms to be used, even though special forms shall be provided by a particular Act. The Public Health Act is, however, subsequent to the Petty Sessions Act; it contemplates that an order in Form C is to be made *dehors* the Petty Sessions Act, and that such order is capable of being itself served, and I think, therefore, that this case is not governed by section 36 of the Petty Sessions Act.

Mr. Hanna, at the close of his argument, raised the point that the order drawn up in accordance with Form C is bad, on the ground that it appears that five magistrates adjudicated, and that the order is signed by two only. This point, however, was not taken in the conditional order as is required by the Crown Office Rules. The order is good on its face; it purports to be made by two magistrates; and we cannot now embark on an inquiry as to how many actually made it.

ANDREWS, J.:—

The order sought to be quashed in this case is an order of the justices of the 7th January, 1905, as it appears in the Petty Sessions order book, directing the prosecutor (James Ewing) to abate the nuisance therein referred to, and to pay the costs therein mentioned. Upon the application of the prosecutor for a copy of the order which had been made against him, he was furnished by the clerk of Petty Sessions with a certificate setting forth the order as it appeared in the order book, and if this had been the order contemplated by the Public Health (Ireland) Act, 1878, section 112, it has not been disputed that it could not be sustained. It is to be regretted that the prosecutor was given the certificate in question, as he was not unnaturally misled by it, and had he been given a copy of the proper document, I do not think his application for a *certiorari* would have been made.

In my opinion the provisions of the Petty Sessions Act (14 & 15 Vict. c. 93), as regards orders, must be taken to be

qualified by the provisions of the Public Health Act, as regards orders under the latter Act.

The 21st section of the Petty Sessions Act enacts that, in all cases of summary jurisdiction, upon the order of the justices being made, one of the justices present shall enter or cause the clerk to enter the particulars of the case and the substance of the decision in the order book in the prescribed form (that now in use being a form approved of by the Lord Lieutenant in Council, as authorized by the 21st section, in substitution for Form D referred to in that section), and such entry when signed by one of the justices present "shall be deemed to all intents and purposes a conviction or order, as the case may be."

The same section also enacts that, if either party shall require it, a certificate (Form I a) of any order so made shall be delivered to him, and "shall operate to all intents as a good form of conviction or order, as the case may be, for any purpose for which any form of conviction or order may now by law be required."

The 36th section of the Petty Sessions Act provides that in all proceedings under that Act the forms in the schedule thereto, or forms to the like effect, shall be deemed good, and shall be the proper forms to be used, even in cases in which other and different special forms shall be or shall have been prescribed by the particular Act or Acts under which the complaint shall have been made. This section, however, could not preclude Parliament from making a different provision by a subsequent Act.

By the 249th section of the Public Health Act all offences under it may be prosecuted in manner directed by the Summary Jurisdiction Acts, which words, as regards the present case, mean the Petty Sessions Act (see the interpretation of the words "Summary Jurisdiction Acts" in section 2 of the Public Health Act).

The 249th section, therefore, *so far* regulates the procedure in the prosecution of offences under the Public Health Act; but by the 279th section of the Public Health Act the schedules to that Act "shall be read and have effect as part of this Act," and "the forms contained in Schedule C, or forms to the like effect, varied as circumstances may require, may be used, and shall be sufficient, for all purposes."

Now, on referring to Form C in Schedule C to the Public

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Andrews, J.

Health Act, which form is headed "Form of Order for Abatement or Prohibition of Nuisance," I think it clear that an independent order in that form is the very order, and the only order to be made for such purpose under section 112 of the Public Health Act. It is this order which is to be served on the person who is to abate the nuisance, and the form contemplates that this order itself may be served on such person. It is in itself a full and complete order, comprising the requirements of section 112; and, notwithstanding the 36th section of the Petty Sessions Act, I think, by the operation of the 112th and 279th sections of the Public Health Act and its Schedule C, Form C, the provisions of the 21st section of the Petty Sessions Act are necessarily modified as regards orders of this kind under the Public Health Act, and that the order in the present case is not the entry in the order book, but the order which has been actually drawn up and signed in accordance with Form C in Schedule C to the Public Health Act, and served, and which, subject to an observation which was made in relation to it when it was referred to in the course of the argument, is, admittedly, in itself a valid and sufficient order under section 112. Form C in Schedule C appears to provide for the order being signed by two justices only. The order in this case, drawn up in accordance with Form C, is signed by two justices only. The observation that I have referred to was that the Petty Sessions Court, it was said, consisted of five justices, and that the order against Mr. Ewing was made by three of them, the other two having dissented, and that the order produced was invalid because two justices only signed it. No such point was made on the application for the conditional order, nor is it mentioned in the grounds specified in the conditional order; and I do not think that the prosecutor ought to be allowed to raise it now, and open a fresh inquiry into the facts, even assuming the point to be a good one if the facts be as was stated, which I do not decide.

The 36th of the Crown Office Rules of 1891 provides that "no objection on account of any omission or mistake in any judgment or order of any . . . court of summary jurisdiction . . . brought up upon a return to a writ of *certiorari*, and filed at the Crown Office, shall be allowed unless such omission or mistake shall have been specified in the order for issuing such *certiorari*."

Assuming that the order ought to have been signed by three justices, the omission of the signature of one would appear to come within the 36th Crown Office Rule; but whether it does or not the defect, if it exists, could still be cured by the third justice signing it; and had the objection been taken on the application for, or in the grounds of, the conditional order, I have no doubt that the defect would have been cured at once. In my opinion the entry in the order book in this case is, at most, a mere minute of the order, which must be properly drawn up in accordance with Form C in Schedule C; and even if this has not yet been fully done, it can still be done by having the order, as drawn up pursuant to Form C, signed by the three justices who pronounced it, if it was pronounced by three.

As, however, the point is not, in my opinion, open to the prosecutor on this motion, and the facts in relation to it are not fully before the Court, so as to enable the Court to determine whether there is any foundation for the point, I abstain from deciding whether, assuming the facts to be as suggested, the point is, or is not, a good one. In case it should hereafter arise for decision, I may, however, refer to *Ex parte Johnson* (1) and the facts and judgments in that case; and to the cases of *Ex parte Roynton* (2); *Reg.* v. *Lanyon* (3); and *Ex parte Kenyon* (4).

The conditional order in the present case ought to be discharged; but, having regard to the manner in which the prosecutor was misled by the certificate of the Clerk of Petty Sessions, I agree that it should be discharged without costs.

GIBSON, J.:—

The question in this case is whether the decision as entered in the order book is the record of the order made under the Public Health Act, 1878. The summons was regular, but the clerk made a mistake in filling in the book, the entry in which, if constituting the record, would be bad on its face. Under the Petty Sessions Act the entry in the book signed by the justice is the order. The difficulty in the case is that the Public Health

(1) 3 B. & S. 947.
(2) 14 J. P. 129.
(3) 27 L. T. (N. S.) 355.
(4) 45 J. P. 303.

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Gibson, J.

Act, perhaps by oversight, authorizes or prescribes the use of a form applicable to the English practice. In England, under 11 & 12 Vict. c. 43, section 14, which embodied the previously existing practice, a minute of the order was made, but the record was a formal document signed and sealed by the justices, to be lodged with the Clerk of the Peace. Subject to certain limitations, this order could be amended before the return of *certiorari*. The form of order in the schedule to the Public Health Act, 1875, proceeds upon this practice.

Our Act of 1878, section 249, applies the procedure of the Petty Sessions Act, and if that section stood alone, the record would be the signed entry in the Petty Sessions book. Section 279, however, makes the schedules part of the Act, and provides that the forms in Schedule C may be used and shall be sufficient. Form C is practically the same as the English form, requiring, however, only signature by the justices, without sealing. The form purports to be the very order of the justices, and it contemplates that such original order may be served. The order in this case was signed by the justices; it is admittedly unimpeachable in form, and section 279 declares that it is sufficient for all purposes. Its validity cannot be affected by any mistaken entry in the order book. Under the Petty Sessions Act the record of the decision orally pronounced in Court is the signed entry. Under the statute of 1878 the oral order is evidenced by the signed form of order by which the magistrates record their decision, and which probably could be amended, in the same way as in England, before the return of *certiorari*. The result is that the form where it is used displaces the provisions of the Petty Sessions Act *pro tanto*. This is inconvenient, as there is no provision as in England requiring the signed order to be recorded. Where the summons is dismissed, apparently the record should be entered as prescribed by the Petty Sessions Act. If the use of Form C, or its equivalent, was optional (which I much doubt), the Petty Sessions Act might govern where that form was not used. I have endeavoured to discover some way of preserving the operation of the Petty Sessions Act, sect. 21, consistently with the sufficiency of Form C; but I find it impossible to see how a sufficient original signed order following Form C can be vitiated by an antecedent mistaken

contrary. If the latter was quashed, it could not affect the subsequent signed regular order, which is the primary and sufficient record.

No case directly in point has been cited; but *Murphy's Case* (1) and *Lyster's Case* (2) give some assistance. The former decides that where Petty Sessions procedure is used, though such use is not prescribed, section 21 does not apply to the form of order under section 162 of the Grand Jury Act, which, like the order here, is an independent and distinct record. The latter shows that the elaborate appeal procedure of the Petty Sessions Act is by implication made inapplicable to appeals under the Act of 1878. The 36th section of the Petty Sessions Act contains a peculiar provision making Petty Sessions forms the proper forms to be used notwithstanding that special statutory forms are afterwards prescribed; but this cannot control the construction of subsequent legislation, or compel the Court to give effect to the general statute by sacrificing a subsequent special enactment inconsistent with it.

A further point was incidentally suggested, that if five magistrates sat, the signature of two was insufficient. No such ground was referred to in the conditional order or affidavits. Even though the magistrates who made the order should sign, it does not follow that they must sign at the same time and place. If there is no such obligation, the extra signatures could be probably now attached. I need not, however, discuss or decide this point, as it is not available on the conditional order.

Solicitors for the prosecutor: *Galway & Beattie.*

Solicitors for the Castlereagh Rural District Council: *William Harper & Co.*

J. G. T.

(1) [1894] 2 I. R. 81.

(2) [1901] 2 I. R. 132, note.

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CERTIORARI—*Costs — Successful prosecutor.*] The King's Bench Division in Ireland can give costs in *certiorari* proceedings of a civil nature to a successful prosecutor. The reason of the distinction in this respect between the powers of the English and the Irish Courts explained. *R.* (*Shannon*) v. *Holywood Urban District Council* K.B. 154

2. —— *Justices—Jurisdiction*—14 & 15 *Vict. c.* 92, *s.* 15—*Summary Jurisdiction Act.*] An order, made in favour of the complainant by Justices on a summons for possession, stated that the tenancy was a weekly tenancy, but omitted to state the amount of the rent. It therefore failed to show on its face that the Justices had jurisdiction to make it. The defendant was put out of possession on a warrant issued under the order. The defendant subsequently applied for a conditional order for a writ of *certiorari* to quash the order:—*Held*, by the Court of Appeal (affirming the decision of the King's Bench Division), that the conditional order should not be granted; that the granting of a writ of *certiorari* at the instance of a private person is a matter of discretion, and not *ex debito justitiæ*; that, as the order had been executed and the writ of *certiorari* would not restore her to possession, no benefit would be gained by the applicant from the writ, as her rights were not prejudiced by the order, seeing that it was null and void. The writ of *certiorari* is the apt means for preventing the infliction or continuance of any wrong by any unwarranted assumption of jurisdiction. *R.* (*M'Swiggan*) v. *Justices of County Londonderry* - - - - - K. B. 318

3. —— *Local Government — County Council — Proposal Committee—Lowest tender—Resolution—Contract—Mandamus—Procedure of Councils* (*Privy Council*) *Order*, 1899, *Articles* 16, 38 — *Local Government* (*Ireland*) *Act*, 1902 (2 *Edw.* 7, *c.* 38), *s.* 18 (1), (2), (3), (5).] The proposal committee of the County Council of *K.* accepted the tender of *R.* & *Q.* for printing and office requisites. Among the other tenders received there were two which were lower than the tender accepted, and the minute made in obedience to the Local Government Board (Ireland) Act, 1902, sect. 18 (1), stated that their reasons for not accepting the lower tenders were that *R.* & *Q.* had fought a combination amongst local newspaper proprietors and printers so successfully that the cost of printing and advertising had been reduced throughout the county, and so long as *R.* & *Q.* continued to tender at reasonable prices they considered it the duty of public bodies to give them the preference, and furthermore, their work in previous years had been most satisfactory:—*Held*, by Palles, C.B., that the resolution adopting the tender was not within the definition of acts judicial, viz. acts done in exercise, or assumed exercise, of jurisdiction by competent authority, and imposing liability *per se*, or affecting the rights of others, and, whether taken by itself or in connexion with the contract subsequently entered into, the resolution could not be brought up on *certiorari*. *Held*, by Andrews and Johnson, JJ., that, under the circumstances of the case, where there was an existing contract, which the Court was not in a position to interfere with, and where the applicant was not entitled, as of right, to the writ, *certiorari* should not be granted. *Held*, also, that where such a contract, being one that the County Council had power to enter into, is impeached upon the ground that it was entered into *mala fide*, it is a contract voidable only and not void, and the Court would not, while it remains a subsisting contract, issue a mandamus to enter continuances and consider the tenders according to law. *R.* (*Quinnell*) v. *County Council of Kerry* - - K. B. 299

4. —— *Order of Quarter Sessions—Renewal of publican's license.*] An order made by the Chairman and Justices at Quarter Sessions, granting a certificate for renewal of a publican's license, on an appeal from the decision of the magistrates at Petty Sessions, is subject to review in the King's Bench Division, and may be quashed on *certiorari*. *In re Russell* (22 L. R. Ir. 487) considered *R.* (*Roe*) v. *Justices of Roscommon* [K. B. 101; APP. 112

—— Certificate of Taxing Master—58 & 59 Vict. c. 111 - - - - - - 121
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—— Conviction—Justices—Amendment of entry in order book - - - - 309
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—— Order of Quarter Sessions—Erroneous reversal of Justices' conviction - - 510
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COLLUSION — Judgment — Setting aside — Application by third party - 292
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COMMISSIONERS OF INLAND REVENUE—Shares—Valuation for purposes of estate duty - - - - 218
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—— Head office out of the jurisdiction—Substitution of service—Special mode of service
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COMPENSATION—Town Clerk—Dismissal—Misconduct - - - 167, 188
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COMPLAINT—*Justices—Jurisdiction — Conviction—Assault*—24 & 25 *Vict. c.* 100, *s.* 40—*Single offence, with matter of aggravation—Reversal at Quarter Sessions upon the erroneous ground that the order was bad on its face*—Certiorari—*Mandamus.*] Justices at Petty Sessions made an order in the following form:—"Upon the hearing of a complaint that, &c., the defendant did unlawfully assault the complainant, by striking him on the face with a stone and cutting him, an order was made on, &c., against Cornelius Collins, farmer's son, to the following effect, viz.—Convicted; fined 21*s.*, with 20*s.* costs, and in default of payment forthwith to be imprisoned in Limerick Prison for one calendar month, with hard labour, unless said sums be sooner paid." On appeal by Collins to Quarter Sessions, that Court reversed the Petty Sessions order, on the ground that the conviction was bad on its face, for not stating the offence for which the accused was convicted:—*Held*, that the complaint, being for a single offence, which the Justices at Petty Sessions had jurisdiction to entertain, viz., an assault under 24 & 25 Vict. c. 100, s. 40, coupled (by describing how the assault was committed) with matter of aggravation, the conviction was good on its face, and the Court of Quarter Sessions were wrong in reversing it upon the preliminary point, without deciding the case upon the merits, and that therefore a *certiorari* should be awarded to quash the order made at Quarter Sessions, and, on its return, a mandamus to the Chairman and Justices, to proceed to hear and determine the appeal. *R.* (*M'Grath*) v. *Chairman and Justices of Clare* [K. B. 510

COMPULSORY PURCHASE—Lands Clauses (Taxation of Costs) Act, 1895—Public local inquiry—Taxing Master's Certificate—*Certiorari* - - - 121
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CONDITION—Policy of insurance—Suicide—Accident - - - - - 1, 26
See POLICY OF INSURANCE.

CONSTRUCTION OF STATUTE—*Incorporation of section of former statute with omission of certain words.*] Where a statute incorporates a section of a former statute, and directs that it is to apply as if certain words were omitted therefrom, the incorporated section is not to be construed as if such words had never existed therein. The principle of the *Attorney-General* v. *Lamplough* (3 Ex. D. 214) applied. *Attorney-General, Informant*; *Smyth and Fenton, Defendants* K. B. 553

CONTRACT—*Acceptance—Offer, or invitation of offer—Application for "quotation"—Quotation furnished.*] Plaintiffs wrote to defendants (canvas manufacturers):—"Please give us your lowest quotation for 3,000 yards of canvas, 32½ inches wide, to the enclosed sample, or near, and your shortest time for delivery." Defendants replied—"We enclose sample nearest we have to match yours. Lowest price, 32½ inches wide, is 4⅝*d.* per yard 36 inches measure. Delivery of 3000 yards in 5/6 weeks." Plaintiffs replied to this—"Please get made for us 3000 yards canvas, 32½ inches wide, as per your quotation, at 4⅝*d.* per yard; deliver same as quickly as possible. Also please quote us for same 52 inches wide for quantity of about 20,000 yards annually. As we have not had the pleasure of doing business with you before, we give you as reference," &c., mentioning two firms:—*Held*, that defendants' letter was not an offer to sell, but merely a quotation of terms on which plaintiffs might offer an order; that the plaintiffs' letter in reply was an offer of an order, and not an acceptance of an offer; and that there was no completed contract between the parties. *Boyers* v. *Duke* - K. B. 617

—— County Council—Disqualification of contractor for election - - 590
See COUNTY COUNCIL.

—— County Council—Repair of guard wall—Negligence - - - 415, 542
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—— County Council—Resolution accepting tender—*Certiorari* - - - - 299
See CERTIORARI. 3.

CONTRIBUTORY PLACE—*Local Government—Water supply—Sewage works—Meaning of "expenses incurred"—Area of charge—Public Health* (*Ireland*) *Act*, 1878 (41 & 42 *Vict. c.* 52), *s.* 232—*Local Government* (*Ireland*) *Act*, 1898 (61 & 62 *Vict. c.* 37)—*Powers of the Local Government Board.*] The expression "expenses incurred" in section 232 of the Public Health Act, 1878, means actual or estimated expenses. The powers of the Local Government Board to fix the area of charge upon which special expenses shall be chargeable are not confined to cases in which the expenses

CONTRIBUTORY PLACE—*continued.*
have actually been incurred, but can be exercised in relation to future estimated expenses. By sealed order, reciting that the Rural District Council of *C.* had incurred, or were about to incur, special expenses, for the purpose of providing a water supply and drainage system, and maintaining same, at the town of *B.* in the rural district, the Local Government Board determined that the two electoral divisions of *B.* urban and *B.* rural should be the area of charge, upon which all expenses incurred, or which might be incurred, by the Council should be chargeable. The works were mainly intended to benefit the town of *B.*, which was co-extensive with the electoral division of *B.* urban; but it was alleged by affidavit that benefits from the proposed works would also extend to the electoral division of *B.* rural, which surrounded the town of *B.* on every side, viz. the river, which received the sewage from the town, and which was the principal source of water supply for *B.* rural, would be purified; the pipe-line of the waterworks which would run through a considerable portion of *B.* rural, could be tapped by the ratepayers: and it was proposed to establish a fountain at certain cross-roads for the use of the inhabitants of *B.* rural;—*Held*, that the electoral divisions of *B.* urban and *B.* rural, being contributory places within the meaning of section 232 of the Public Health Act, 1878, were places which the Local Government Board was entitled to fix as the area of charge. *Held*, also (Gibson, J., *dissentiente*), that, although the sealed order did not contain any specific recital that the expenses incurred, or to be incurred, were "in, or in respect of," the contributory places mentioned, the Court should not, where there had been no transgression of the prescribed limits, quash the order on that ground. *R.* (*Potts*) v. *Local Government Board* [K. B. 324; App. 342

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CONVICTION—Entry in order-book—Amendment - - - - - - 309
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—— Quarter Sessions—Reversal upon erroneous ground—Complaint—Assault with matter of aggravation - - - - - 510
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COSTS—Lands Clauses (Taxation of Costs) Act, 1895—Public local inquiry—*Certiorari* [121
See Taxation of Costs.

—— Recovery of, by solicitor—Unregistered member of firm - - - - - 62
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—— Successful prosecutor—*Certiorari* - 154
See Certiorari. 1.

COUNTERCLAIM—Admission of claim—Lodgment of money in Court—Stay on payment out - - - - - - - 132
See Payment out of Court.

COUNTY COUNCIL—*Local Government—Urban district council—Disqualification—Member acting when concerned in contract with council—Contract completed on part of member at time of acting—Disqualification for election—Continuance of such disqualification notwithstanding subsequent completion of contract—Schedule to Local Government (Application of Enactments) Order, 1898, art. 12.*] On the 7th November, 1904, *H.* obtained a contract from an urban district council for printing to be done in connexion with the forthcoming election of members of the council. The election took place on the 16th January, 1905, and *H.* was elected a member. At the date of his election *H.* had completed the contract on his part, with the exception of the printing of the notice of the result of the election, but had not received payment of the contract price. On the 18th January *H.* printed the notice of the result of the election, thus completing the contract on his part. On the 23rd January *H.* attended a meeting of the council, signed the declaration of acceptance of office, and acted in the proceedings. Before leaving he was paid the amount of his contract:—*Held*, that *H.* had acted as a member of the council when disqualified, and was liable to the penalty imposed by art. 12 (11) of the Schedule to the Local Government (Application of Enactments) Order, 1898. *Royse* v. *Birley* (L. R. 4 C. P. 296), and *Connolly* v. *Fitzgerald* (unreported) distinguished. *Cox* v. *Truscott* (21 Times L. R. 319) considered. *O'Carroll, Appellant*; *Hastings, Respondent.* [K. B. 590

—— Liability for negligence of contractor—Repair of guard wall - - - - 415, 542
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—— Proposal Committee—Lowest tender—Contract—*Certiorari* - - - - 299
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COUNTY COURT — Civil-bill ejectment — Estoppel - - - - - - 189
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—— Interpleader - - - - - - 241
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CRIMINAL LAW—Conviction—Justices—Entry in order-book—Amendment 309
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—— Habitual drunkard—Plea of guilty to principal offence—Jury—Depositions—Evidence - - - - - - - 577
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DEATH—Drowning—Whether suicide or accidental - - - - - - 1, 26
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—— Of father of seduced girl before birth of child—Action by mother - - - 552
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—— Within twelve months of execution of settlement—Duty - - - - - 553
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DELIVERY—Within limits of market—Goods outside - - - - - - 209
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DEPOSITIONS—Charge of habitual drunkenness - - - - - - 577
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DESTITUTION—Blind child—Maintenance by guardians—Liability of father - 585
See BLIND CHILD.

DISCOVERY—*Privilege—Documents privileged in previous action between third parties—Order XXXI., Rules* 12-14.] In an action by the plaintiffs against the defendants, claiming damages arising from the acts of the defendants in causing, during the course of salvage operations, a wrecked vessel to become an obstruction, the defendants, under an order for discovery of documents, stated, on affidavit, that they had in their possession certain documents, consisting of confidential correspondence, reports, &c., obtained or made by them as agents for an Insurance Company, in reference to matters arising in litigation "then anticipated and afterwards instituted" by the owner of the vessel against the said Insurance Company for the purpose of enabling the latter to be advised upon, and to defend, the claim made against them:—*Held*, that the defendants were not entitled to exemption from discovery, as the documents would not have been privileged in the earlier action by the shipowner. *The County Council of Kerry* v. *The Liverpool Salvage Association and Thomas Ensor & Son* - - - - K. B. 38; APP. 46

2. —— *Privilege—Report by agent of defendant.*] In an action claiming damages for negligence the defendants, by their affidavit of discovery, claimed privilege in respect of a document mentioned in the schedule thereto. The said document consisted of a report drawn up by an agent of the defendants, who, three days after the occurrence complained of in the action, called upon the plaintiff, and took down his evidence in writing. The document was (the defendants alleged) read over on completion to the plaintiff, and was admittedly signed by the plaintiff as a marksman:—*Held*, that the defendants were not entitled to exemption from discovery in respect of the said document. *Tobakin* v. *Dublin Southern Districts Tramways Co.*

[K. B. 58; APP. 61

DISMISS—Civil-bill ejectment—Estoppel 189
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DISMISSAL—Town clerk—Misconduct—Incapacity—Compensation - 167, 188
See TOWN CLERK.
DISQUALIFICATION—County councillor—Contract with council—Whether continuing at time of election - 590
See COUNTY COUNCIL.
DOCUMENTS—Discovery—Privilege 38, 46, [58, 61
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DOG—*Licence—Possession of unlicensed dog acquired after* 31*st March—Summons charging such possession in February of following year—Dogs Regulation* (*Ireland*) *Act*, 1865 (28 *Vict. c.* 50), *section* 20.] Section 20 of the Dogs Regulation (Ireland) Act, 1865, imposes a penalty on any person who shall, after the 31st March in each year, have in his possession a dog not duly licensed in accordance with the provisions of the Act. *F.* was charged on summons, under the section, with having, on the 17th February, 1904, had in his possession a dog without having obtained a license. Evidence was given that *F.* had the dog in his possession on the 17th February, 1904, and that he had got it in August, 1903, and had never taken out a license. The dog was two or three years old:—*Held*, that the summons, in merely charging possession of an unlicensed dog on the 17th February, disclosed no offence. *Per* Gibson and Madden, JJ.: Section 20 of the Act is not confined in its application to a person who was in possession of the dog before the 31st March, but includes a person acquiring possession of an unlicensed dog after that date. *Quære*: If very young dogs come within the Act. *M'Elroy, Appellant*; *Freeman, Respondent* - K.B 367

DROWNING—Presumption against suicide 1, [26
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DRUNKENNESS—Admission of drunken person on railway platform—Injury to passenger - - - 378, 401
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DUTY—*Ad valorem*—Conveyance or transfer on sale - - - - - - 69
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EQUITABLE EXECUTION—Receiver 56
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ESTATE DUTY—*Settlement—Death of settlor within twelve months from execution of settlement—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* (1) (*c*).] Estate duty is payable upon the death of a settlor in respect of property included in an antenuptial settlement executed by him, within twelve months before his death, on the marriage of his son, for which settlement there was no consideration in money or money's worth, although no estate for his life, or for any period determinable by reference to his death, is reserved to the settlor by the settlement. *Attorney-General, Informant*; *Smyth and Fenton, Defendants* - - - K.B. 553

2. —— *Settlement—Gift* inter vivos—*Interest retained by settlor—Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12), *section* 38 (2), *as amended by the Customs and Inland Revenue Act*, 1889 (52 *Vict. c.* 7), *section* 11, *and the Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *section* 2 (1) (*c*).] *C.* made a settlement more than twelve months before his death, whereby he conveyed a mortgage debt of £15,000 to trustees, upon trust to pay £575 of the income to his daughter *S.* for life, and after her death in trust for her children who should answer a particular description, with power, however, by her will, to appoint to her husband during his life a yearly sum of £300, payable out of the income. If there should be no child who would answer the description specified, the trustees were to hold the trust funds after the death of *S.* (but subject to the annuity of *S.*'s husband) in trust for *C.* absolutely. The trustees, during the life of *S.*, were to hold the balance of the income, after the payment of the yearly sum of £575 to *S.* or the annuity to *S.*'s husband, upon trust for *C.* absolutely:—*Held*, that, upon the death of *C.*, neither the ultimate contingent trust for *C.* of the *corpus* of the fund, nor the trust for *C.* of the surplus income, rendered the gift one "of which *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise," within the meaning of clause (a) of the Customs and Inland Revenue Act, 1881, section 38 (2), as amended by section 11 of the Customs and Inland Revenue Act, 1889, and the Finance Act, 1894, section 2 (1), clause (c). *Held*, also, that the settlement did not reserve to the settlor any interest "for life, or any other period determinable by reference to death," within the meaning of clause (c) of the Customs and Inland Revenue Act, 1881, section 38 (2), as amended by section 11 of the Customs and Inland Revenue Act, 1889, and the Finance Act, 1894, section 2 (1), clause (c). *Held*, therefore, that neither estate duty nor "settlement estate duty" was payable by the executors of *C.* in respect of such part of the £15,000 as constituted the benefits conferred upon *S.*, her issue and her husband. *Held*, also, that "estate duty," but not "settlement estate duty," was payable in respect of the expectancy of *C.* in the £15,000, in the event of there being a failure of children to take under the trusts, but that the executors were entitled to postpone payment until the interest might fall into possession. *Held*, also, that estate duty, but not settlement estate duty, was payable in respect of the principal value of the interest of *C.* during the lifetime of *S.* in the surplus income over the £575 a-year. *In re the Finance Act*, 1894, *and Cochrane* [K. B. 626

ESTATE DUTY—*continued.*

3. —— *Shares—Company—Articles of association—Restrictions on transfer—Right of pre-emption—Principle of valuation—Sale in open market—Property passing on death—Repugnancy—Rule against perpetuity—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 16—*Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 3, 5; 7, *sub-s.* 5; 13, 22 (*b*).] By will, dated the 26th July, 1901, a testator devised all the residue of his property to his executors upon trust to pay the interest of one-sixth part thereof to each of five of the testator's sons and daughters, respectively, for life; and of the remaining one-sixth part, to such of the children of a deceased daughter as should then be living, in equal shares; and he directed that, subject to the said life estates, his trustees should hold the said respective sixth parts or shares (save as to the share of one daughter, which, after her death, was to be held in trust for the remaining residuary legatees) upon trust, for such person or persons as the parties respectively entitled to a life interest in the said shares might by deed or will appoint. The testator died on the 15th September, 1901, and the said will was duly proved by the three executors therein named. The residuary estate of the testator included 750 fully paid-up shares in the firm of J. J. & Son, Ltd., a Company registered on the 9th October, 1891, under the Joint Stock Companies Acts, dividends upon which had been paid by the Company for some years previously to the testator's death at the rate of 20 per cent. per annum. The articles of association of the Company contained an elaborate series of provisions relating to the registration of holders and to the alienation of shares in the Company, whereby it was (*inter alia*) provided that any member proposing to transfer a share should serve a "transfer notice" upon the Company (who were not bound to recognise any equitable claim to a share) of his intention to transfer, which notice constituted the Company his agent for the sale of the share to any member at the "fair value thereof," the latter being defined as a sum of £100, or such other sum as

ESTATE DUTY—*continued.*
should from time to time be fixed as the "fair value" by resolution of the Company in general meeting. No share could, save as therein provided, be transferred to a non-member so long as any member was willing to purchase the same at the "fair value," the directors being empowered to refuse to register any transfer to a non-member of whom they did not approve, such transfer being void. Upon the Company, within twenty-eight days after the service of "the transfer notice," finding a member willing to purchase, the retiring member was bound, upon the payment of the "fair valne," to transfer the share to the purchasing member, in default of which the Company might receive the purchase-money and enter the name of the purchasing member in the register as the holder of the share. In the event of the Company not finding a purchaser within the twenty-eight days specified, the retiring member might, within three months, sell and transfer the share to any person, subject to the approval of the directors, and at any price. It was provided that the executors or administrators of a deceased member should be the only persons recognised by the Company as having any title to the shares registered in the name of such member, and that any person becoming entitled to a share in consequence of the death of any member might, subject to the regulations contained in the articles, transfer such share to himself or any other person; the executors of a deceased member being further empowered, subject to the approval of the directors, to transfer the share of such member to his son or brother, or to any son or brother of any existing member. Upon the death of the testator the executors paid for estate duty in respect of the said 750 shares a sum calculated on the basis that the value thereof was, having regard to the right of pre-emption and restrictions on transfer and sale contained in the articles, limited to the "fair value" of each share fixed by the articles at £100, and refused to pay any further duty. On an information by the Attorney-General, seeking a declaration that on the death of the testator estate duty became payable, under the Finance Act, 1894, upon the principal value of the said shares, being the price which same would fetch if sold in the open market at the time of the testator's death, and that such value was not limited to the "fair value" of £100 a share, or for the determination of the manner in which such value was to be ascertained:—*Held*, by the Court of Appeal, varying the order of the King's Bench Division (reported [1904] 2 I. R. 644), that the principal value of the shares ought to be estimated at the price which, in the opinion of the Commissioners of Inland Revenue, they would fetch if sold in the open market on the terms that the purchaser

ESTATE DUTY—*continued.*
should be entitled to be registered and should be registered as the holder of the shares, and should take and hold them subject to the articles of association, including the articles relating to the alienation and transfer of the shares of the Company. *Attorney-General* v. *Jameson* [App. 218

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HABITUAL DRUNKARD—*continued.*
Evidence—Depositions.] Section 1 of the Inebriates Act, 1898, is not confined to cases where the offender is convicted by a jury of an offence such as mentioned in the section. It applies also where the offender pleads guilty to such offence, and in such case if he does not admit that he is a habitual drunkard a jury may be sworn to inquire as to this:—So *held* by the Court for Crown Cases Reserved. *Held*, also, by Lord O'Brien, L.C.J., and Andrews, Johnson, Gibson, Madden, Boyd, Kenny, and Wright, JJ. (Palles, C.B., *diss.*), that in such case the evidence necessary to satisfy the Court that the offence charged was committed under the influence of drink may consist of the depositions taken before the magistrates when the accused was returned for trial—*Held*, by Palles, C.B., that the depositions are not evidence for such purpose, and that the evidence must be given by witnesses duly sworn, examined *vivâ voce* in presence of the prisoner, and liable to cross-examination. *The King* v. *Meehan* CR. CAS. RES. [577

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INTEREST ON MONEY—Excessive rate—Default clause—Harsh and unconscionable transaction - - - 134
See MONEY LENDER.

INTERPLEADER—*Practice, County Court—Claimant—Sheriff—Civil Bill Act*, 1851 (14 & 15 *Vict. c.* 57), *s.* 150.] Section 150 of the Civil Bill

INTERPLEADER—*continued.*
Act, 1851, applies to seizures by the sheriff as well as to seizures by special bailiff appointed by the execution creditor. Where a claim is made by a third party to goods seized under a civil-bill decree, and the claimant obtains possession of the goods by lodging with the sheriff the affidavit of ownership prescribed by section 150 of the Civil Bill Act, 1851, together with the amount of the decree, he is bound to follow up the procedure prescribed by that section by causing an interpleader civil bill to be served on the execution creditor, returnable to the next Quarter Sessions; and he is barred from pursuing any remedy (*e.g.*, for money had and received, or for wrongful seizure and detention) which he might have had against the sheriff independently of the Act. Upon failure of the claimant to institute interpleader proceedings, the sheriff should, at the expiration of ten days after the next ensuing Quarter Sessions, hand over the money to the execution creditor; but *quære*, whether the claimant would have a remedy over against the execution creditor in respect of the money so paid to him by the sheriff. *Walsh* v. *Goodman* - - - - - - K. B. 241

JUDGMENT—Setting aside—Collusion—Application by third party - - 292
See SETTING ASIDE JUDGMENT.

JURISDICTION—Defendant out of — False address—Setting aside writ - 251
See ADDRESS.

—— Quarter Sessions—Appeal—Striking out in default of appearance - - 644
See APPEAL.

—— Railway Company having principal office in England—Substitution of service 251
See SUBSTITUTION OF SERVICE.

—— Trial of charge of habitual drunkenness—Jury - - - - - - 577
See HABITUAL DRUNKARD.

JUSTICES—*Conviction—Entry in order book—Inability of Justices to amend subsequently.*] *B.*, a publican, was charged on summons before three magistrates at Petty Sessions with having supplied intoxicating liquor to a drunken person. The case was heard on the 26th February, 1904, and *B.* was convicted, the order then made, as appearing from the order book, being—"Defendant convicted, and fined 40*s.* and costs, 1*s.*, to be recorded on his license. In default of payment one month's imprisonment in *C.* gaol." Subsequently, on the 17th June, two of the magistrates who had adjudicated, with the concurrence of the third, who was not then present, amended the order in the order book by adding the words "without hard labour" and "unless said sums be sooner paid." The conviction, in its original form, was admittedly bad:—*Held*, that, under the circumstances, there was no jurisdiction to amend the conviction. *Held*,

JUSTICES—*continued.*
by Lord O'Brien, L.C.J., and *semble*, by Gibson, J., that after the magistrates adjudicating at Petty Sessions have separated they have no power to amend an order made by them and duly entered in the order book. *Held*, by Gibson and Madden, JJ., that, even assuming the magistrates had such power (as to which Madden, J., expressed no opinion), it could only be exercised by all the magistrates who originally adjudicated reassembling, and making the amendment as a judicial act. *The King* (*Burke*) v. *Justices of Co. Cork* - - K. B. 309

2. —— *Public health — Nuisance — Order for abatement—What constitutes order—Signature of order — Justices — Summary jurisdiction — Public Health* (*Ireland*) *Act*, 1878 (41 & 42 *Vict. c.* 52) *ss.* 249, 279, *Sched. C, Form C—Petty Sessions* (*Ireland*) *Act*, 1851 (14 & 15 *Vict. c.* 93), *ss.* 21, 36.] Where Justices make an order for the abatement of a nuisance, under section 112 of the Public Health (Ireland) Act, 1878, the order of the Justices is not the entry in the order book, but the document drawn up in accordance with Form C in Schedule C of the Act. If the order so drawn up is good in form, its validity is not affected by the fact that the entry in the order book would be bad on its face as an order. *Quære:* Where such order is made by more than two Justices, must all sign the order, or is signature by two sufficient? *The King* (*Ewing*) v. *Justices of Down* K. B. 648

—— Appeal to Quarter Sessions — Default of appearance—Striking out - 644
See APPEAL.

—— Appeal to Quarter Sessions — Renewal of publican's license—Certiorari 101, 112
See CERTIORARI. 4.

—— Certificate—Renewal of publican's license — Premises not conducted as publichouse
See LICENSING ACTS. 1. [101, 112

——Complaint — Single offence with matter of aggravation - - - - 510
See COMPLAINT.

—— Dog—Summons charging possession of, in February unlicensed - - 367
See DOG.

—— Weekly tenant—Order for possession—Certiorari—Discretion - - - 318
See CERTIORARI. 2.

LABEL—Margarine - - - - 147
See MARGARINE.

LANDLORD AND TENANT—Lease
See LEASE.

—— Surrender—Licensed premises—Alterations
See LICENSING ACTS. 2. [74, 83

—— Weekly tenant—Order for possession—Justices—Certiorari - - - 318
See CERTIORARI. 2.

LANDS CLAUSES ACT—Costs—Taxation—*Certiorari* - - - - 121
See TAXATION OF COSTS.

LEASE—Sale—Abatement of rent—Notice by landlord to discontinue—Suppression of material fact - - - 267, 286
See MISREPRESENTATION.

LEGACY—Transfer of stock by executor to legatee—Stamp duty - - - 69
See STAMP.

LETTERS—Whether constituting a concluded contract—Sale of goods—Quotation
See CONTRACT. [617

LIABILITY OF EMPLOYER—County council—Contractor—Repair of guard wall
See NEGLIGENCE. 1. [415, 542

LICENSE—Dog—Acquisition of unlicensed after 31st March - - - - 367
See DOG.

—— Valuation of publichouse - - 448, 497
See VALUATION.

LICENSED PREMISES—Surrender—Alterations—2 Edw. 7, c. 18 - 74, 83
See LICENSING ACTS. 2.

LICENSING ACTS — *Certificate entitling applicant to obtain renewal of license—Certificate as to manner in which publichouse has been conducted in the past year—Publichouse closed and no liquor sold therein, except on two or three days during the year* —17 & 18 *Vict. c.* 89, *s.* 11.] An application was made to the Annual Licensing Petty Sessions on 25th September, 1902, on behalf of *E. P.*, who was not present, for a certificate to enable her to renew a publican's license of certain premises, of which she was tenant, and which were already licensed in her name. The constabulary opposed the issue of the certificate on the grounds that the premises had not been conducted as a publichouse for two years, and that there was no stock of liquor therein during the preceding twelve months. Evidence in support of the objection was given by a police sergeant. No evidence to contradict it was offered on behalf of the applicant, and the magistrates refused the certificate. The applicant appealed to Quarter Sessions on the 13th October, 1902, and the Chairman and Justices heard the evidence of the police sergeant, and also of the applicant, who swore that from 22nd September, 1902, to 25th September, 1902, and from that date on to the date of the appeal, she had kept the premises open for sale of, and had in fact sold, drink, and gave instances and particulars of such sale. The Chairman and Justices, on this evidence, granted the certificate. The prosecutor applied for and obtained a conditional order for a *certiorari* to bring up and quash the order so made at Quarter Sessions, and the applicant showed cause against the conditional order. The King's Bench Division having allowed the cause shown:—*Held*, by the Court of Appeal,

LICENSING ACTS—*continued.*
that in order to entitle the applicant to the certificate there must have been a continuance of the trade in the past year; that in the absence of any explanation of the non-user of the premises as a publichouse during the greater part of the year, the evidence of the sale of drink to a few persons on the three days before the Licensing Sessions was not evidence on which the Chairman and Justices were at liberty to infer that the premises were conducted as a publichouse in the year previous to the Licensing Sessions, and that the conditional order for the *certiorari* should be made absolute. *R.* (*Jones*) v. *Justices of Co. Kerry* (*Meagher's Case*) (31 I. L. T. R. 47) overruled. *The King* (*Roe*) v. *Justices of Roscommon* - K. B. 101; APP. 112

2. —— *Licensing* (*Ireland*) *Act*, 1902 (2 *Edw.* 7, *c.* 18)—*Transfer—New license—Surrender of lease—Premises pulled down and rebuilt—Existence of license—Licensed premises.*] *A.*, the tenant of a licensed house, surrendered the house to the landlord in November, 1901. *A.* had carried on the business of a publican on the premises up to the time of surrender, and had obtained on the 10th October, 1901, the usual Excise license for the year expiring 10th October, 1902. After the surrender the existing house was pulled down, and a new house built, which, with the curtilage attached thereto, covered the site of the old premises, and also a considerable additional area. In September, 1902, *A.* endorsed the license, and handed it over to *B.*, who was in possession of the new premises. *B.* applied at the Annual Licensing Quarter Sessions in October, 1902, for a transfer of *A.*'s license, and also for a new license. Both applications were refused, the County Court Judge having ruled that there was not at the date of the passing of the Act of 1902 any license in existence in respect of the premises or any portion thereof, and that the premises were not attached to or adjoining premises licensed at the passing of the Act. On an application by *B.* for writs of *certiorari* and mandamus:—*Held*, by the King's Bench Division, that *B.* was not entitled to a transfer of *A.*'s license, and that, as the case did not come within any of the exceptions in the Licensing (Ireland) Act, 1902, there was no jurisdiction to grant a new license. *Held*, *per* Palles, C.B., and Barton, J., that the license granted to *A.* was still in force at the date of the passing of the Licensing (Ireland) Act, 1902 (31st July, 1902); but *held* that the words "the said licensed premises" in the proviso to section 6 of the Act meant the formerly licensed premises, and that, as in the present case, the new buildings in which it was intended that the business should be carried on did not include any substantial part of the formerly licensed premises, the case did not come within section 6. *Held*, *per* Wright J., that the license granted to *A.* was not in force at the date of the passing of the Act, and that, on this further ground the case was excluded from section 6; and that the case was not within section 3, inasmuch as that section applies only where the expiration of the lease, by reason of which the license is extinguished, or surrendered, takes place after the passing of the Act. On appeal:—*Held*, *per* Lord Ashbourne, C., and FitzGibbon, L.J., that the ruling of the County Court Judge was wrong, inasmuch as there was, as matter of law, a license in existence in respect of the premises at the date of the passing of the Act, and that the premises were, within the meaning of section 6 of the Act, attached to or adjoining premises licensed at the date of the passing of the Act, and that, therefore, the mandamus should go. *Held*, *per* Walker and Holmes, L.JJ., that the premises were not licensed at the date of the passing of the Act, and that they were not attached to or adjoining premises licensed for the sale of intoxicating liquors at the date of the passing of the Act, within the meaning of section 6 of the Act, and that, therefore, the decision appealed from was correct. The Court of Appeal, being equally divided, made no order on the appeal, and, accordingly, the order of the King's Bench Division stood affirmed. *The King* (*Blackburn*) v. *Justices of Down* K. B. 74; APP. 83

LIGHTING — Of vehicles — By-law — Reasonableness - - - - - - 47
See BY-LAW.

LOCAL GOVERNMENT—County Council—Repair of guard wall — Contractor — Negligence - - - 415, 542
See NEGLIGENCE. 1.

—— Poor rate—Principle on which to be struck—Right of ratepayers to inspect estimate
See RATES. [154

—— Sealed order — Expenses incurred — Water supply—Sewage works - 324, 342
See CONTRIBUTORY PLACE.

—— Tender — Resolution of County Council — *Certiorari* - - - - - 299
See CERTIORARI. 3.

—— Town clerk — Dismissal for misconduct — Compensation - - - 167, 188
See TOWN CLERK.

MANDAMUS—County Council—Consideration of tenders - - - - - 299
See CERTIORARI. 3.

—— Quarter Sessions—Reversal of order of Justices on erroneous grounds - 510
See COMPLAINT.

MARGARINE—"*Parcel*" *as distinguished from* "*package*"—*Exposing for sale—Label—Margarine Act*, 1887 (50 & 51 *Vict. c.* 29), *section* 6.] Section 6 of the Margarine Act, 1887, prescribes the following regulations, to be observed by persons dealing in margarine—(1) "Every package,

MARGARINE—*continued.*
whether open or closed, and containing margarine, shall be branded or durably marked 'margarine' on the top, bottom, and side, in printed capital letters not less than three-quarters of an inch square"; and (2) "And if such margarine be exposed for sale by retail, there shall be attached to each parcel thereof so exposed, and in such manner as to be clearly visible to the purchaser, a label marked in printed capital letters not less than one and a half inches square, 'margarine.'" On the defendant's counter there was a butt of margarine, from which the lid had been removed, but which was branded on the lid, bottom, and side with the word "margarine." There was no label attached, as required by the second regulation. Defendant's assistant, on being asked for one pound of margarine by the prosecutor, sliced away that quantity from the margarine in the butt, and sold it to him. The defendant was prosecuted under the second regulation, but the magistrates declined to convict, upon the ground that, upon the acts proved, it had not been violated:—*Held*, that the facts brought the defendant within the second regulation, and that the magistrates ought to have convicted the defendant thereunder. *Maguire, Appellant*; *Porter, Respondent* [K. B. 147

MARKET—*Tolls—Agreement to sell goods then outside market limits, followed by delivery within limits—Markets and Fairs Clauses Act*, 1847 (10 *Vict. c.* 14), *section* 13.] Section 13 of the Markets and Fairs Clauses Act, 1847, imposes a penalty on every person selling, or exposing for sale, within the limits of a market, except in his own dwelling-house or shop, any tollable articles. *G.* was charged on summons with having sold, or exposed for sale, on the 13th June, 1904, within the limits of a market, a quantity of potatoes, which were tollable articles. It appeared that on the 9th June *G.* had agreed with *M.*, within the limits of the market, to supply him with 1 cwt. of potatoes, on price being agreed on. The potatoes were not at the time within the limits of the market, but were delivered within such limits on the 13th June:—*Held*, that *G.* was not guilty of an offence within the section. *Gracey* v. *Banbridge Urban District Council* - - - - K. B. 209

MARRIED WOMAN—Working farm independently of husband—Petition for arrangement—Bankruptcy - 343
See BANKRUPTCY.

MASTER AND SERVANT—Lighting of vehicles—By-law - - - 47
See BY-LAW.

—— Seduction—Death of father of seduced girl before birth of child—Action by mother—Services - - - - 552
See SEDUCTION.

MASTER AND SERVANT—*continued.*
—— Town clerk—Dismissal—Misconduct 167, [188
See TOWN CLERK.

MISCONDUCT—Town clerk—Dismissal 167, [188
See TOWN CLERK.

MISREPRESENTATION—*Action of deceit—Fraud—Fraudulent misrepresentation—Concealment of material fact—Sale by auction.*] The defendant, an auctioneer, was employed by *B.*, a solicitor, acting on behalf of a client, to sell a publichouse. The defendant published an advertisement, the instructions for which he received from *B.*, in which the premises were described as "held under lease for a term of years, at £25. A rent of £18 yearly has been accepted by the landlord for several years in lieu of said rent of £25. The rent, license duty, and taxes, are less than 11*s.* weekly." This calculation was made on the basis of the yearly rent being £18. The lease contained a covenant against alienation without the landlord's consent; but the defendant was not aware of this. Some days before the auction the landlord wrote to the defendant a letter, stating that in future he would insist on payment of the higher rent. The defendant consulted *B.* as to what course he should adopt, and *B.*, being of opinion that the landlord was estopped from recovering more than £18 a-year, instructed the defendant to proceed. The defendant believed this opinion to be correct. At the auction the defendant read the statement as to the rent without comment. The plaintiff was declared the purchaser, at £430. The plaintiff believed that the landlord could recover the full rent, but thought he would be content to receive the reduced rent. The landlord subsequently sued the plaintiff for the full rent, and the plaintiff was obliged to pay. In an action for deceit against the auctioneer, which was tried before Wright, J., without a jury, judgment was entered for the defendant:—*Held*, by Palles, C.B., and Johnson, J. (*dissentiente* Andrews, J.), that, on the evidence, the defendant had no intention to deceive; that he did not state what he knew to be untrue, and that the statement was made in the honest belief that it was true; and that the defendant was not liable. *Held*, by the Court of Appeal (reversing the decision of the majority of the King's Bench Division), that the statement in the advertisement, and in the particulars of sale, implied a representation that the vendor had no reason to believe that the reduction in the rent would be discontinued; that the case was not one of mere suppression, but that it involved misrepresentation; and that the defendant was liable for damages. *Derry* v. *Peek* (14 A. C. 374) distinguished. *Delany* v. *Keogh* [K. B. 267; APP. 286

MONEY LENDER—*Money Lenders Act*, 1900—*Re-opening transaction—Payment by monthly instalments—Default clause—Harsh and unconscion-*

MONEY LENDER—*continued.*

able transaction—Excessive rate of interest.] In response to an advertisement by the plaintiff, an English registered money lender, offering advances without publicity, "repayable by easy instalments," the defendant, an Irish farmer, on the 5th March, 1903, applied for and obtained an advance of £70 on his note for £100, £25 whereof was repayable in five monthly instalments, and the balance (£75) payable on the 5th September, 1903, with a clause that, on default in payment of any instalment, the whole debt should become due and payable. This note was paid off, and a renewal in the same terms was made on the 5th September, 1903, a note being given in the same form, and £70 being advanced. Of this the defendant paid four instalments of £5 each, and a writ having been issued against him for £80, he paid a sum of £30 and signed a new note for £74 in April, 1904, payable by five consecutive monthly instalments of £5 each, and the balance (£49) on the 15th October, 1904. On foot of this note he paid £5, and the writ in the present action was issued for the balance of £69 in July, 1904:—*Held*, that the transaction was harsh and unconscionable, within the meaning of the Money Lenders Act, 1900, and should be re-opened, judgment being entered for a sum which the Court considered reasonable as representing unpaid principal and interest. *Wells* v. *Joyce*

[Lord O'Brien, L.C.J. 134

MONEY PAID—Execution creditor — County Court—Interpleader - - - 241

See Interpleader.

NEGLIGENCE — *Local Government — County Council —Repair of guard-walls — Obstruction of high road—Independent contractor—Casual or collateral negligence—Grand Jury Act* (6 & 7 *Wm.* 4, *c.* 116), *ss.* 50–56—*Local Government Act*, 1898 (61 & 62 *Vict. c.* 37), *ss.* 4, 72—*Procedure of Councils Order*, 30*th January*, 1899, *Articles* 19, 20, 22, 23—*Local Government Board* (*Ir.*) *Provisional Order Confirmation Act*, 1901 (1 *Edw.* 7, *c.* cxli), *s.* 15.] A County Council employed an independent contractor to take down and rebuild portions of the guard-wall of a public road. The public road was 20 feet 9 inches in breadth, was bounded on either side by a wall, and had no grass fringes between the carriage way and the bounding walls. The land at the other side of the damaged wall being private property, there was nowhere but the public road itself on which to place debris from the wall and materials for its reconstruction. No provisions were inserted in the contract obliging the contractor to fence, protect, or light any materials which he might, in the course of the work, be obliged to place on the road; neither did the County Council take any steps to ensure that such precautions would be adopted. The contractor placed

NEGLIGENCE—*continued.*

a heap of debris and materials on the road, from 2 to 2½ feet high, extending out 8 feet from the wall under repair, and, in fact, covering the wheel-track on one side. He left the heap in this position at night, without any lights, fencing, or protection of any kind. The obstruction caused a school cart, on which the plaintiff was travelling after dark, to upset, and the plaintiff was thrown out and injured. *Held*, that the County Council, as a "road authority," has not the immunity formerly possessed by the Grand Jury, but is bound to see that reasonable precautions for the safety of those lawfully using a public highway are taken when repairs are being executed on the highway; that the negligence of the contractor, in placing the obstruction on the highway, and leaving it unlighted and unfenced, was not casual or collateral negligence, but negligence in doing the thing contracted for, and that therefore the County Council was liable in an action for negligence. *Clements* v. *County Council of Tyrone.*

[K. B. 415; App. 542

2. —— *Railway — Evidence of negligence—Liability of Company for injuries caused to passenger by act of drunken man admitted on their premises.*] *A.* was a passenger by the defendants' railway. *F.*, a drunken man, with a ticket, was admitted to the platform at *O.* station, and passed the barrier where the ticket-checker was stationed. *F.* was seen obviously drunk outside, but there was no evidence that there was anything in his conduct to attract the attention of the ticket-checker. *F.* then attempted to enter a first-class carriage, when the station-master ordered a porter to keep him back. Whilst the porter was leading *F.* along the platform, *F.* suddenly swung his arm and broke the window of the carriage in which *A.* was sitting, *A.* being severely injured by the broken glass. At the trial of an action for damages brought by *A.*, and founded upon the alleged negligence and want of care on the part of the defendants, a verdict was found and judgment was entered for the plaintiff. On motion by the defendants:—*Held*, by Boyd and Wright, JJ. (Gibson, J., dissenting), that the verdict and judgment should be set aside and judgment entered for the defendants, on the ground that, even if there was evidence to support the finding by the jury of negligence, such negligence was not the *causa causans*, but only the *causa sine qua non* of the accident. *Held*, by the Court of Appeal (Walker, L.J., *diss.*), that there ought to be a new trial of the action, as the case was left to the jury on the erroneous assumption that if the drunken man was "obviously drunk," either the neglect to notice that condition, or the admission of him in that condition as a passenger, rendered the Company absolutely responsible for all that he did.—*Per* Walker, L.J.: There was evidence to

NEGLIGENCE—*continued.*
support the findings of the jury, and the verdict should stand. *Adderley* v. *Great Northern Railway Co.* - - - - K. B. 378; App. 401

NEW TRIAL—*Practice — Admission of illegal evidence—Action for slander—Substantial wrong or miscarriage—R. S. C. (Ir.) Order XXXIX., R. 7.*] The defendants, husband and wife, were sued for slander spoken by the defendant, Mrs. *B.*, of the plaintiff. Mrs. *B.* at first denied the speaking of the words; but afterwards, at the invitation of *S.*, Mrs. *B.* wrote two apologies, one to *S.* and another to *A.*, a person implicated; but did not apologise to the plaintiff. *B.* was not present when the apologies were written, and there was no evidence that he was aware of the apologies. *B.* subsequently made an offer of £10 to the plaintiff to settle the case, accompanied with a threat if she did not accept the offer. At the trial the speaking of the words was proved by two witnesses, and neither of the defendants was examined. The Judge admitted the apologies as evidence, subject to objection. The jury found a verdict for the plaintiff. On motion for a new trial:—*Held*, by the King's Bench Division, that the apologies signed by Mrs. *B.* were not evidence against her husband, and the Court ordered a new trial.—*Held*, by the Court of Appeal (affirming the decision of the King's Bench Division), that the apologies of the wife were not admissible in evidence; but, *held*, further, that even if the apologies were wrongly admitted, there was evidence without them sufficient to sustain the verdict; that no substantial wrong or miscarriage had been occasioned in the trial; and that the verdict should stand. *Tait* v. *Beggs* - K. B. 525; App. 530

NEXT ELDEST—*Will — Construction — Gift over—"Next eldest brother" — Restriction upon alienation.*] *B.*, by his will, left all his property to his wife for life, and after her death he devised to each of six of his sons a specific portion of his landed property, and to the other (his third) son he left one shilling. He charged some of these lands so devised with portions for his daughters, and he directed that if any of his sons should die before he attained the age of thirty, the portion of him so dying should go to his "next eldest brother, and so on, respectively"; and if any of them should die without issue lawfully begotten after attaining the age of thirty years, then his share should go to his "next eldest brother," and so on, respectively." Proviso, that no devisee should be at liberty to sell his share to any person save one of his brothers, at a price to be fixed by arbitration. The testator died in 1867, leaving him surviving his widow and seven sons, all of whom attained thirty. *G. B.*, the eldest son, died in 1900, leaving children surviving. Some of the other sons were unmarried, and some were married, but had no children. The widow died in 1903. On an originating summons, issued for the purpose of obtaining the determination of the Court upon the construction of the will:—In the King's Bench Division, *held*, by Gibson, J., that the descending scale applied, and that, upon the death of a devisee without issue, the brother next younger in age to the deceased would take. *Held*, by Boyd, J., that the limitation over was void for uncertainty. *Held*, by Wright, J., that the brother immediately senior to the deceased would take. *Fitzgerald* v. *Fitzgerald* (12 Ir. Ch. R. 442), and *Eastwood* v. *Lockwood* (L. R. 3 Eq. 487), considered. *Held, per Curiam*, that the restriction on alienation was void. *Held*, by the Court of Appeal, that by "next eldest brother" was meant the next younger, and not the next elder. The Court of Appeal declined to decide any other question. *Crofts* v. *Beamish* [K. B. 349; App. 361

NEXT-OF-KIN — Collusive judgment against administrator - - - - - 292
See Setting aside Judgment.

NUISANCE — Abatement — Order of Justices *See* Justices. 2. [648

ORDER — Justices — Public Health Act, 1878 *See* Justices. 2. [648

ORDERS, GENERAL—1891 (19th January), Supreme Court, IX., Rr. 5, 11 - 251
See Substitution of Service.

—— —— XVI., R. 11 - - - - 292
See Setting aside Judgment.

—— —— XXII., R. 6 - - - 132
See Payment out of Court.

—— —— XXVII., R. 16 - - - 292
See Setting aside Judgment.

—— —— XXXI., Rr. 12–14 - - 38, 46
See Discovery.

—— —— XXIX., R. 7 - - 525, 530
See New Trial.

—— 1898 (22nd Dec.), Application of Enactments, Art. 12 - - - - 590
See County Council.

— 1899 (30th Jan.), Procedure of Councils, Articles 16, 33 - - - 299
See Certiorari. 3.

—— —— Articles 19, 20, 22, 23 - 415, 542
See Negligence. 1.

PARCEL—As distinguished from package—Margarine—Label - - - 147
See Margarine.

PASSENGER—Railway—Injury—Admission of drunken man - - - 378, 401
See Negligence. 2.

PAYMENT OUT OF COURT—*Practice—Claim—Admission of—Counterclaim—Money lodged in Court—Order XXII., Rule* 6.] In an action for a liquidated demand, brought by plaintiffs carrying on business outside of the jurisdiction, the defen-

PAYMENT OUT OF COURT—*continued.*
dants admitted the claim and lodged in Court the full amount claimed, but set up a counterclaim for damages to a greater amount:—The Court granted an application, under Order XXII., Rule 6, for an order, restraining the plaintiffs from drawing out the money so lodged until the matters in dispute in the counterclaim should be disposed of, notwithstanding that security for costs had been given by the plaintiffs. *Cyprean Fabre & Co.* v. *R. and H. Hall & Co.* - - - - - - K. B. 132

PENALTY—District Councillor—Acting while disqualified—Continuing contract 590
See COUNTY COUNCIL.

PERPETUITY—Rule against—Restriction on transfer of shares—Company - 218
See ESTATE DUTY. 3.

POLICY OF INSURANCE—*Condition in policy—Condition against suicide—Cause of death—Injury by accident from an outward, external, and visible means or cause—Drowning—Presumption against crime.*] *H.* insured his life with the defendants by a policy, which became a claim if the insured sustained any bodily injury by accident from an outward, external, and visible means or cause, and died solely from the effects of such accident within ninety days; but the defendants were only bound to pay after proof, satisfactory to the directors of the Company for the time being, of the cause of death had been given. The policy contained a condition that it would not extend to death by suicide, and a condition that in the event of any dispute arising between the Company and any claimant it should be referred to arbitration, and that the decision of the arbitrator should be conclusive evidence of the amount payable in respect of the claim, and that obtaining an award should be a condition precedent to the liability of the Company to pay any claim under the policy. The insured (*H.*) was last seen alive in Cork about 7 o'clock p.m., on the 1st April, 1902. On the 20th April, his body was found in the south branch of the River Lee, about one mile above Cork, without any marks of violence. At the coroner's inquest very little evidence was given, and a verdict was returned of "found drowned," and a newspaper cutting, containing the evidence and the finding at the coroner's inquest, was sent by the personal representative to the Company, claiming payment. The Company refused to pay, and the matter was referred to arbitration. Further evidence was given before the arbitrator tending to explain the finding of the body in the place where it was found, and to prove the probability of accident. The arbitrator found that the death was caused solely by drowning; that the insured died solely from the effects of bodily injury from an outward, external, and visible means or cause, but that no evidence was given by either party on which the arbitrator could find or determine at what particular part of the river, in what manner, under what circumstances, or from what immediate cause, he became immersed in the river so as to be drowned, or on which he could find or determine, apart from any presumption of law, whether the cause of death was accident or suicide. He further awarded that proof of death by drowning was given, but no proof was given to the directors from which they ought to be reasonably satisfied that the death was accidental; if, on the true construction of the policy, the *onus* lay on the claimant of giving such proof, he awarded that he had not:—*Held*, by Madden and Wright, JJ., (1) that proof by the administrator of *H.* that *H.* was found drowned in the River Lee, and that his death resulted solely from drowning, was not a sufficient compliance with the terms and conditions of the policy to entitle the administrator of *H.* to recover; (2) that the *onus* lay on the administrator of *H.* to give to the Company such proof of the drowning of *H.*, and the proximate cause thereof, as ought reasonably to satisfy the Company that the drowning was the result of accident. *Held*, by Lord O'Brien, L.C.J., (1) if there was nothing more in the case than the mere fact of the body being found drowned, that, having regard to the presumption against suicide and crime, death would be referable to an accident, and the administrator would, accordingly, be entitled to recover; but (2) that all the facts having been referred to the consideration of the Court by the arbitrator, the Company were, and would be, justified in not being satisfied that the death was due to an accident, and that, accordingly, judgment should be in favour of the defendants. *Held*, by the Court of Appeal, upon the first question, that death by drowning is death from an outward, external, and visible means or cause, and that death from such a cause is *prima facie* death by accident; and when the tribunal of fact found the evidence so equally balanced that there was precisely the same weight of evidence in favour of accident as of suicide, the presumption of law against crime would entitle the claimant to recover the amount of the policy. The Court of Appeal affirmed the decision of the King's Bench Division as to the second question. *Harvey* v. *Ocean Accident and Guarantee Corporation* K. B. 1; [APP. 26

POOR LAW—Destitute blind child — Maintenance by guardians—Liability of father—
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—— Judgment—Setting aside—Collusion—Application by third party - - 292
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RAILWAY COMPANY—Negligence—Admission of drunken man on premises—Injury to passenger - - - 378, 401
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RATES—*Local Government — Urban District Council—Poor rate—Demand note of County Council, giving credit for a certain sum, and demanding balance — Resolution of Urban District Council, allocating sum credited in relief of taxation for next five years—Illegality of poor rate struck on this basis—Power of Urban District Council to strike poor rate in one financial year to meet demands payable at the beginning of the next financial year—Right of ratepayers to inspect estimate of poor rate—Local Government (Ir.) Act*, 1898, *ss.* 46 (1), 51 (6).] A County Council, by its demand note, demanded a certain sum from an Urban District Council, the amount being arrived at after giving credit to the Urban District Council for a sum of about £300, the balance standing to the credit of the Urban District Council in the hands of the County Council at the close of the preceding financial year, arising from an adjustment of accounts between the County Council and the Urban District Council consequent upon a Provisional Order altering their financial relations. The Urban District Council resolved that £60 per annum of this sum of £300 so credited should be allocated towards reduction of the rates during the next five years, and struck the poor rate for the ensuing year on this basis:—*Held*, that the Urban District Council had acted illegally in spreading over five years a sum which should have been applied immediately in relief of the ratepayers, and that the rate was bad. An Urban District Council, in striking a poor rate, is not limited to striking a rate sufficient to raise the amount demanded by the County

RATES—*continued.*
Council and the costs of collection. A rate may be struck sufficient to raise, in addition, a sum which will enable the Council to have in hand sufficient to meet its liability in respect of demands which will be payable at the commencement of the next financial year at a time when it will not be possible to obtain money under the taxing powers for that year. Ratepayers have a right to inspect the estimate prepared by the clerk of an Urban District Council for the purpose of making poor rate. *The King* (*Shannon*) v. *Holywood Urban District Council* [K. B. 154

—— Rated occupier — Aggregation — Separate premises—Belfast Harbour Act, 1883 *See* BELFAST HARBOUR. [574

REASONABLENESS— By-law — Lighting of vehicles - - - - - - 47 *See* BY-LAW.

RECEIVER—*Practice — Equitable execution — Application by judgment creditor to be appointed receiver over rents of houses the property of the defendant.*] The defendant was the owner of two houses at *T.* in the county of Galway, one of which was let as the police barracks at £30 a year, and the other was let at £24 a year. The rent payable by the defendant for the plot of ground on which the houses were built was £1; the taxes payable in respect of the barracks were £2 13*s.*, and in respect of the other house 11*s.* The plaintiff was a judgment creditor, who had issued a writ of *fieri facias* against the defendant, to which there was a return of *nulla bona*. Plaintiff applied that he should be appointed receiver by way of equitable execution. *Held* (affirming the decision of Kenny, J.), that the application should be refused. *Orr* v. *Grierson* (28 L. R. Ir. 20) distinguished. *Cohen* v. *Ruddy* [APP. 56

RENEWAL OF LICENSE—Justices' certificate —Dormant license - - 101, 112 *See* LICENSING ACTS. 1.

REPORT—Of agent—Privilege - 58, 61 *See* DISCOVERY. 2.

RESTRAINT ON ALIENATION—Will 349 *See* NEXT ELDEST.

REVENUE—Estate duty—Death of settlor within twelve months - - - 553 *See* ESTATE DUTY. 1.

—— Estate duty—Gift *inter vivos* - - 626 *See* ESTATE DUTY. 2.

—— Estate duty—Shares—Restriction on transfer *See* ESTATE DUTY. 3. [218

—— Stamp duty—Conveyance or transfer on sale *See* STAMP. [69

REVOCATION OF WILL — *Directions to destroy—1 Viet. c. 26, s. 20.*] A testatrix, in a letter addressed to her daughter, which was signed by her in the presence of two witnesses, directed her will to be destroyed:—*Held*, that the letter was a writing declaring an intention to revoke the will, though not being of a testamentary character, it was not admitted to probate; but liberty was given to a next-of-kin to apply for a grant, as in the case of intestacy. *In the Goods of Eyre* - - - - - K. B. (PROB.) 540

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—— Market—Delivery within limits — Goods outside - - - - - - 209 *See* MARKET.

SEDUCTION—*Services to father and mother—Child born after death of the seduced girl's father—Action by her mother.*] Appeal by the plaintiff from the judgment of the King's Bench Division—[1903] 2 I. R. 407. The Court (Lord Ashbourne, C., and FitzGibbon, Walker, and Holmes, L.JJ.) affirmed the order of the King's Bench Division, and dismissed the appeal. *Hamilton* v. *Long* - - - - - APP. 552

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SERVICE—Substitution—Special statutory mode —Defendant out of the jurisdiction 251 *See* SUBSTITUTION OF SERVICE.

SETTING ASIDE JUDGMENT — *Practice—Application by a person not party to the record—Order XVI., Rule 11—Order XXVII., Rule 16.*] Where, in an action against an administrator of a deceased intestate for money alleged to have been paid by the plaintiff for the use of the deceased, judgment was allowed to be marked by collusion between the plaintiff and defendant:—*Held*, that a next-of-kin, not a party to the record, whose interest in the assets of the deceased was prejudicially affected by the judgment, had such a specific interest in the assets of the deceased as to entitle him to an order in the action, setting aside the judgment, and giving him leave to intervene. *Mehaffey* v. *Mehaffey* - - - K. B. 292

SETTING ASIDE WRIT—Defendant out of the jurisdiction — False address within the jurisdiction - - - - 251 *See* ADDRESS.

SETTLEMENT—Death of settlor within twelve months—Estate duty - - 553 *See* ESTATE DUTY. 1.

—— Gift *inter vivos* — No interest retained by settlor—Estate duty - - 626 *See* ESTATE DUTY. 2.

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—— Will - - - - - - - 612
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SLANDER—Admission of illegal evidence — G. O. XXXIX., R. 7 - 525, 530
See NEW TRIAL.

SOLICITOR— *Costs — Solicitors (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 17), *s.* 48.] *P.* and *P.*, junior, who were father and son, carried on business together as solicitors at Armagh, under the name of *J. E. P. & Son*. *P.*, junior, had served his apprenticeship to his father, and had been admitted a solicitor about five years. There was no deed of partnership between them, no division of profits, and no accounts of profits between them. An action was commenced in 1902 by the plaintiff, with *J. E. P. & Son* as his solicitors. It was tried at Belfast at the Summer Assizes for 1902, and resulted in judgment for the plaintiff for £105 and costs. By an oversight of the town agent of *J. E. P. & Son*, in Dublin, the duty was not paid on the license of *P.*, junior, for the year 1902, and it remained unpaid till October, 1902, when the omission was discovered and the money was paid; but the license for the certificate of *P.*, senior, was paid. On taxation of the costs the defendant objected to such of the items of the bill of costs as represented work done while the duty on the license of *P.*, junior, remained unpaid. *P.*, senior, deposed that all the work in the case had been done by himself:—*Held* (affirming the decision of Boyd, J.), that *P.*, senior, was entitled to recover the entire of the costs. *Martin* v. *Sherry* - - APP. 62

SPECIAL BAILIFF—Seizure by — Money lodged with sheriff—Failure to institute interpleader proceedings - - 241
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STAMP—*Revenue—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39)—*Legacy—Transfer of stock by executor to legatee—Conveyance or transfer on sale*—Ad valorem duty.] Where a legatee under a will agrees with the executor to take payment, or part payment, of the legacy in stock or securities of the testator, the transfer deed executed in pursuance of the agreement is a "conveyance or transfer on sale," within the meaning of the Stamp Act, 1891, and is chargeable with *ad valorem* duty, to be assessed in accordance with the provisions of that Act. *Dawson* v. *Commissioners of Inland Revenue*

STATUTE, Construction of [K. B. 69
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1 Vict. c. 26—Wills, s. 20 - - - 540
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1 & 2 Vict. c. 28—Sale of Bread, s. 4 - 258
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1 & 2 Vict. c. 56—Poor Law, ss. 53, 54 585
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6 & 7 Vict. c. 92—Poor Law, s. 14 - 585
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8 & 9 Vict. c. 18—Lands Clauses, s. 34 121
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8 & 9 Vict. c. 20—Railways Clauses, s. 135
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61 & 62 Vict. c. 17—Solicitors, s. 48 - 62
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61 & 62 Vict. c. 37—Local Government, ss. 4, 72 - - - - - - 415, 542
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61 & 62 Vict. c. 60—Inebriates, s. 1 - 577
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63 & 64 Vict c. 51—Money Lenders, - 134
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1 Edw. 7, c cxli—Local Government Board (Ir.) Provisional Order Confirmation, s. 15 - - - - - 415, 542
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2 Edw. 7, c. 18—Licensing, s. 6 - 74, 83
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SUBSTITUTION OF SERVICE—*Practice—Railway Company—Principal office in England—Railways Clauses Consolidation Act*, 1845, *s.* 135—*Special mode of service—Order IX., Rr.* 5, 11—*Order XI., R.* 1.] Where there is a statutory provision regulating service of process upon a defendant, by which such process ought to be served out of the jurisdiction, service of a writ of summons cannot be effected under Order IX., Rule 2, on an agent within the jurisdiction; and service of the writ in an action not within Order XI., Rule 1, cannot be substituted under Order IX., Rule 5, on such an agent. The principal office of a Railway Company, within sect. 135 of the Railways Clauses Consolidation Act, 1845, is the head office where the government of the railway is carried on. *Lewis* v. *Herbert* (16 L. R. Ir. 340) observed upon. *Clokey* v. *London and North-Western Railway Co.* - - - K. B. 251

SURRENDER—Licensed premises—Existing license—2 Edw. 7, c. 15, s. 6 74, 83
See LICENSING ACTS. 2.

TAXATION OF COSTS—*Military Lands Act*, 1892 (55 & 56 *Vict. c.* 43), *s.* 2—*Costs of local public inquiry—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 34—*Lands Clauses (Taxation of Costs) Act*, 1895 (58 & 59 *Vict. c.* 111)—*Taxation of costs by Master—Jurisdiction of Court to review taxation*—Certiorari.] Lands belonging to *P.* were taken by the Secretary of State for War, under the Military Lands Act, 1892 (which incorporates, with some immaterial exceptions, the Lands Clauses Consolidation Act, 1845), and the amount of the purchase-money and compensation payable to *P.* was determined by arbitration, the sum so awarded being greater than the sum offered by the Secretary of State. The costs having been referred for taxation to a Taxing Master, under the provisions of the Lands Clauses (Taxation of Costs) Act, 1895, the Taxing Master allowed to *P.* (*inter alia*) the costs incurred by him in connexion with the public local inquiry held in pursuance of sect. 2 of the Military Lands Act, 1892:—*Held*, that the Taxing Master had no jurisdiction to allow such costs:—But *held*, that the function of the Master in taxing costs under the Lands Clauses (Taxation of Costs) Act, 1895, is ministerial merely, and not judicial, and that therefore his certificate, allowing the costs of such inquiry, could not be quashed on *certiorari*. *The King* (*Secretary of State for War*) v. *Goff* - - - K. B. 121

TENDER—County council—Resolution accepting—Contract—*Certiorari*—Mandamus
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TOWN CLERK—*Dismissal of—Local Government—Employer and servant—Misconduct—Incapacity—Compensation*—61 & 62 *Vict. c.* 37, *sect.* 115, *sub-sect.* 19; *sect.* 116.] In resisting a claim by a town clerk, or clerk to the commissioners of a town, for a superannuation allowance or gratuity, under sect. 116 of the Local Government (Ireland) Act, 1898, it is open to the borough or commissioners to rely upon an act of misconduct, as justifying dismissal, other than that for which they purported to dismiss the claimant. Wilful disobedience of the reasonable orders of his employers amounts to misconduct warranting the dismissal of a town clerk, and disentitles him to a superannuation allowance or gratuity under section 116. *Kenealey* v. *Mayor, Aldermen, and Burgesses of Kilkenny* [K. B. 167; App. 188

TRANSFER—License—Alterations in premises *See* Licensing Acts. 2. [74, 83

—— On sale—Stamp duty - - - 69
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TRIAL—Inebriates Act—Plea of guilty to principal offence - - - - 577
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—— New—Admission of illegal evidence—G. O. XXXIX., R. 7 - - 525, 530
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VALUATION—*Poor rate — Publichouse — Value of license taken into account—Valuation (Ireland) Act,* 1852 (15 & 16 *Vict. c.* 63), *s.* 11—*Appeal from valuation to Commissioner of Valuation—Appointment of valuators to view premises who had been engaged in the original valuation of other tenements in the same city—Valuation (Ireland) Act,* 1852, *ss.* 17, 20.] In ascertaining the value, under the Valuation (Ireland) Act, 1852, of a licensed publichouse, regard must be had to the existence of the license. So *held*, by the King's Bench Division (Lord O'Brien, L.C.J., and Gibson, J.; Madden, J., *diss.*) and by the Court of Appeal. The occupier of premises in the city of Belfast appealed to the Commissioner of Valuation against the value assessed on his premises upon a general revision of the valuation of Belfast, directed by the Lord Lieutenant. The Commissioner of valuation directed two valuators to view the premises and make a report, as provided by

VALUATION—*continued.*
sect. 20 of the Valuation (Ireland) Act, 1852. Neither of these valuators had been employed in the original revision of the valuation of the premises in question, but they had both been employed in the original revision of the valuation of other premises in the city of Belfast:—*Held*, by the King's Bench Division and Court of Appeal, that the fact of the valuators having been employed in the original revision of the valuation of such other premises was no objection to their being appointed to value the premises in question. *Armstrong, Appellant; Commissioner of Valuation, Respondent* - - - K. B. 448; App. 497

—— For estate duty—Shares—Restricted right of transfer—Pre-emption - - 218
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WALL—Repair of — Contractor — Negligence—County Council - - 415, 542
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WATER SUPPLY — Contributory place — Powers of Local Government Board 324, [342
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WAY—Obstruction—Negligence of contractor — County Council - - 415, 542
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WEEKLY TENANT—14 & 15 Vict. c. 92, s. 15—Certiorari - - - 318
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WEIGHT—Sale of bread - - - 258
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WILL—*Separate pieces of paper fastened by pin—Signature and attestation clause put first (in the opinion of the Court inadvertently) after execution.*] Testatrix wrote her will on several sheets of paper pinned together. At the time of application for probate, the testatrix's signature and the attestation clause was the first of these papers. The Court, being of opinion on the evidence that the sheet containing the signature and attestation clause was originally written last, and therefore at the end of the will, and might have been afterwards inadvertently misplaced, granted probate. Character of evidence to sustain an application on such grounds considered. *In the Goods of Madden* - - - - K. B. (Prob.) 612

—— Construction—Gift over on death under prescribed ages or without issue to devisee's "next eldest brother" - - 349, 361
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—— Revocation—Direction to destroy 540
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WORDS—"Conveyance or transfer on sale"—54 & 55 Vict. c. 39 - - - 69
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—— "Expenses incurred"—41 & 42 Vict. c. 52, s. 232 - - - - 324, 342
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—— "Next eldest brother"—Will 349, 361
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WRIT OF SUMMONS—Defendant out of the jurisdiction—False address within the jurisdiction—Setting aside - 251
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THE END.

BIBL.
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NAT.